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United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHWESTERN MUTUAL FIRE ASSOCIA-
TION, a corporation,

Appellant,

vs.

UNION MUTUAL FIRE INSURANCE COM-
PANY OF PROVIDENCE, RHODE
ISLAND, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

DEC - 6 1943

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

Attorneys for Appellant

MESSRS. SHANK, BELT, RODE & COOK
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Seattle, Washington

Attorneys for Appellee

MESSRS. BOGLE, BOGLE & GATES
603 Central Building
Seattle, Washington [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the Superior Court of the State of Washington,
for King County.

No. 33-31-31

NORTHWESTERN MUTUAL FIRE ASSOCIA-
TION, a corporation,

Plaintiff,

v.

UNION MUTUAL FIRE INSURANCE COM-
PANY of Providence, Rhode Island, a corpo-
ration,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action
against the defendant alleges:

I.

That the plaintiff now is and during all the times
hereinafter mentioned was a coporation duly incor-
porated under the laws of the State of Washington,
and has paid its license fee last due to the State of
Washington.

II.

That the defendant now is and during all the
times hereinafter mentioned was a corporation duly
incorporated under the laws of the State of Rhode
Island, and duly admitted to do business within
the State of Washington.

III.

That on or about the first day of January, 1940, the parties hereto entered into a mutual agreement in writing, of which the parts material to this complaint are as follows: [3]

“Between the Union Mutual Fire Insurance Company, of Providence, Rhode Island, hereinafter called the reinsuring company, and the Northwestern Mutual Fire Association, of Seattle, Washington, hereinafter called the reinsured company, issued effective January 1, 1940.

“Article I.

“Agreement to Cede and Accept Reinsurance. The reinsured company agrees to cede reinsurance to the reinsuring company and the reinsuring company agrees to accept reinsurance from the reinsured company on account of liability arising under policies, binders or entries of the reinsured company covering property located anywhere in the United States of America and/or the Dominion of Canada, subject to the following terms and conditions.

“Article II.

“Replaces Previous Agreement. This agreement is issued in lieu of and replaces the agreement between these companies which was issued effective January 1, 1931, and the terms of this agreement shall apply to all pro rata reinsurance between these companies regardless of date of issue, excepting reinsurance placed by the Union Mutual Fire Insurance Company with the Northwestern Mutual Fire Association.

“ARTICLE III.

“Terms and Rates To Be Specified. Reinsurance shall be for such lengths of time and at such rates of premium as shall be specified in binder notices, daily reports and certificates issued hereunder.

* * * * *

“Article V.

“Conditions Assumed by the Reinsured Company To Be Binding on the Reinsuring Company. The conditions of the reinsuring company’s reinsurance shall be identical with those of the reinsured company’s policies, and shall be subject to the same risks, conditions, valuations, endorsements, assignments, cancellations and transfers as are or may be assumed by the said reinsured company; provided, however, that the reinsuring company shall be promptly notified in writing of all changes of a reinsured policy of said reinsured company affecting title, location, amount, rate or term of risk.

“Article VI.

“Reinsuring Company Has Right to Decline and to Cancel. The reinsuring company has the right to cancel any reinsurance by written or telegraphic notice, in which [4] case liability shall terminate not later than noon of the 10th business day following the date of receipt of such notice by the reinsured company or upon the effective date of recession to any other company or companies, whichever event shall first occur; except that if the reinsured company shall begin the cancellation of its policy within the said ten business day period the reinsurance,

upon notice to the reinsuring company, shall continue until such policy cancellation is effected.

“Any request for cancellation of any risk or risks shall specify the insured’s name, city and state, to the extent that the reinsuring Company has received such information from the reinsured company.

“The reinsured company shall have the right to cancel any reinsurance by written or telegraphic notice and in the event of such cancellation the liability shall terminate upon the date specified in the notice.

“It is the intent of this article to provide for the cancellation of the individual cessions but if the reinsuring company demands cancellation of all the risks assumed, or all of any given classification, or all in any city, such cancellation period upon immediate request therefor by the reinsured company, shall be extended to thirty days; provided, however, such ten days notice shall be sufficient if there exists a delinquency in the payment of account or default in the performance of any obligation hereunder which has not been remedied by the reinsured company within ten days after specific notice of intention to cancel because of such delinquency or default.

“A request by the reinsuring company for a reduction of any cession shall be subject to the foregoing provisions applicable to requests for cancellation.”

“Article VII.

“Liability of Reinsuring Company; Entries, Accounts and Settlements of Reinsurance; How and

When Made. Reinsurance hereunder shall be ceded on the daily report and account current plan. The Effective time of each cession shall be that of the reinsured policy unless a later time be specified in the binding notice or reinsurance daily report. Liability shall be made effective by the specific written designation of the reinsuring company by the reinsured company. Reinsurance daily report or binding notice shall be mailed, telegraphed or given to the reinsuring company not later than the close of the next business day following the day of receipt of notice of its liability by the reinsured company; otherwise the reinsuring company shall not be liable upon such cession until such notice is mailed, telegraphed or given. [5]

“The reinsured company shall pay to the reinsuring company on each cession a pro rata share of all original premiums or additional premiums applicable to the policy reinsured and the reinsuring company shall refund a pro rata share of each return premium. Each pro rata share of additional or return premium or dividend on any individual transaction shall be waived if such share is less than 50c and where so waived no report is necessary. Cancellation by the reinsured company of a cession without cancellation of the policy of the reinsured company may be made at any time on a pro rata basis.

“An account current shall be rendered within fifteen days after the close of each month by the reinsured company and the balance thereunder shall

be paid by the debtor upon such account within sixty days after the close of the month to which such account applies.

“Article VIII.

“Kinds of Business Reinsured; Cessions Permitted. This agreement shall apply to any kind of insurance or reinsurance business written by the parties hereto, without limitation as to class, excepting excess and catastrophe reinsurance and excepting
No other exceptions

“Cessions hereunder shall in no case and at no time on one risk exceed \$25,000 nor the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company; except in specific cases subject to the approval of the reinsuring company; provided, (1) the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company; (2) the requirement for net retention will be deemed complied with if the reinsured company shall have its required amount of insurance (a) on building or buildings, (b) on the contents of the buildings, (c) on buildings and contents combined.

* * * * *

“Article XV.

“All Loss Adjustments by the Reinsured Company Binding on the Reinsuring Company. All loss settlements made by the reinsured company, whether

under strict policy conditions or by compromise or otherwise, shall be binding upon the reinsuring company, and the reinsuring company's proportion of the loss shall be payable to the reinsured company upon presentation of reasonable evidence of the amount paid by the reinsured company in settlement of the loss. [6]

"Whenever the pro rata share of loss and loss expense upon any loss shall be less than \$1.00, claim for such loss and expense shall be waived.

* * * * *

"Article XVII.

"Reinsuring Company Liable for Its Proportion of Adjustment Expenses. The reinsuring company shall be liable for its share of all expenses incurred by the reinsured company in connection with the investigation and settlement or contesting of the validity of claims or alleged losses, provided that no legal expenses shall be incurred without notice to and consent of the reinsuring company. The reinsuring company, if it elects so to do, may pay its proportion of any claim against the reinsured company should the reinsuring company prefer not to be a party to the legal test on the part of the reinsured company, and thereupon be discharged from any and all further liability on account of such claim. The reinsuring company shall be entitled to participate in any sums which may be received by the reinsured company, either as salvage or otherwise, except in cases of sums recovered where the reinsuring company may have elected not *be*

be a party with the reinsured company in incurring expenses in connection with such recovery.

* * * * *

“Article XIX.

“Right to Examine Records. The reinsuring company shall have the right to examine at the office of the reinsured company any books, documents, reports or records referring to the risks reinsured under this agreement, at any time while this agreement is in force or within twelve months after the termination of liability or the final settlement of all losses on such reinsurance.

* * * * *

“Article XXI.

“Termination of Agreement. This agreement is unlimited as to its duration, and may be terminated as to the further acceptance of reinsurance at any time by either party giving to the other party thirty days prior written notice of such termination.

“In case of notice of termination the reinsuring company shall continue to participate in all reinsurance coming within the terms of this agreement granted or renewed by the reinsured company during said thirty day period and the provisions of this agreement shall govern [7] all liability of one party to the other arising out of reinsurance ceded under this agreement until the final expiration or cancellation of such reinsurance and until the final settlement of all amounts due or payable by one party to the other.

“In Witness Whereof the parties hereto have caused these presents to be executed effective this 1st day of January, 1940.

NORTHWESTERN MUTUAL
FIRE ASSOCIATION

J. J. BEALL.

Vice-President.

L. D. BRILL.

Secretary.

UNION MUTUAL FIRE IN-
SURANCE COMPANY

C. A. MOSES.

Vice-Pres.

C. H. CADY.

Sec.”

IV.

During the year 1940 the Washington Toll Bridge Authority was constructing a single span suspension bridge across the Tacoma Narrows, said bridge being known as the Tacoma-Narrows Bridge, and in the early part of June, 1940, this plaintiff notified the defendant thereof, and requested that the defendant would inform the plaintiff how much it was prepared to accept from the plaintiff by way of reinsurance on the risk, and upon June 10, 1940, this plaintiff sent to the defendant a telegram in words and figures as follows:

“Seattle, Washington
June 10, 1940

“Union Mutual Fire Insurance Company
10 Weybosset Street
Providence, Rhode Island

“Please refer our letter May 31st Washington
Toll Bridge Authority-Tacoma Narrows Bridge.
Further information just received indicates
PML about 50%.

“We will retain \$50,000. Please wire your
authorization.

Northwestern Mutual Fire
Association” [8]

On June 11, 1940, the plaintiff received from the
defendant a telegram in words and figures as fol-
lows, to-wit:

“EAN 11 11 SER-WUX Providence RI
June 11 1940 1040 A

Northwestern Mutual Fire Assn-

Authorize \$50,000 Washington Toll Bridge
Authority Tacoma Narrows Bridge-

Union Mutual Fire Ins Co

C H Cady

827 AM”

Also on June 17 this plaintiff received from the
defendant a letter of which the following is a copy:

“Union Mutual Fire Insurance Company
Executive Offices, Grosvenor Building
Providence, Rhode Island

June 11, 1940

“Northwestern Mutual Fire Ass’n.

Third Ave. & Pine St.

Seattle, Washington

Washington Toll Bridge Authority

Gentlemen:

In reply to your telegram and in confirmation of ours of even date we authorize you to bind \$50,000. reinsurance of your company covering the above bridge. Kindly let us know the date you wish this authorization bound.

Very truly yours,

/sd/ C H Cady

Secretary”

CHC:MBC” [9]

V.

This plaintiff on or about the same time also received acceptances from other insurance companies of reinsurance similar to the reinsurance above mentioned, in the aggregate sum of \$250,000.00, so that in the latter part of June, 1940, this plaintiff had acceptance from the defendant and other insurance companies of reinsurance to that above specified in the aggregate sum of \$300,000.00, and relying upon the said acceptances of reinsurance of the defendant and other solvent insurance com-

panies this plaintiff executed and delivered to the Washington Toll Bridge Authority its Policy of insurance No. 614-3652, wherein it insured the said Washington Toll Bridge Authority against loss or damage by various risks therein specified upon the said Tacoma-Narrows Bridge and approaches (but excluding the administration building) in the sum of \$350,000.00, and thereafter sent to the said defendant its written notification that the plaintiff had ceded to the defendant \$50,000.00 of reinsurance upon the said policy of insurance in accordance with the defendant's authorization.

VI.

On November 7, 1940, the said insured property suffered considerable damage from a risk within the scope of the said policy, for which the said Washington Toll Bridge Authority made claim against this plaintiff to the full amount of the said policy as for a total loss, and this plaintiff thereafter did on August 21, 1941 in good faith pay to the said Washington Toll Bridge Authority in full compromise settlement of its [10] claim against this plaintiff the sum of \$269,230.78, of which the share which the defendant should reimburse is the sum of \$38,461.54. The plaintiff did on or about the 21st day of August, 1941, deliver to the said defendant proof of loss on account of the matters and things aforesaid in the sum of \$38,461.54, and demanded the said sum of money, but the said defendant has failed and refused to pay the said sum, or any part thereof.

VII.

This plaintiff, in investigating, adjusting and compromising the said loss and in defending the litigation carried on between this plaintiff and the said insured on account of the said loss, necessarily expended the sum of \$11,810.20 of which the defendant's share is \$1687.18, and the said defendant has not paid the said sum or any part thereof.

VIII.

The plaintiff has done and performed all acts and things required by the said Reinsurance Agreement necessary to be done and performed by it.

Wherefore, this plaintiff prays judgment against the said defendant in the sum of \$38,461.54 with interest thereon at the rate of 6% per annum from August 21, 1941 until paid, and upon \$1687.18, with interest thereon at the rate of 6% per annum from the date of service of this complaint until paid, and for costs of suit.

SHANK, BELT, RODE & COOK.

Attorneys for Plaintiff. [11]

State of Washington

County of King—ss:

L. D. Brill, being first duly sworn on oath deposes and says:

That he is Secretary of the Northwestern Mutual Fire Association, a corporation, plaintiff in the above entitled action, and that he makes this verification for and on behalf of said corporation, with full authority so to do; that he has read the fore-

going Complaint, knows the contents thereof, and believes the same to be true.

L. D. BRILL.

Subscribed and sworn to before me this 16th day of January, 1942.

[Seal] E. ROY GLOMSTAD

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed in County Clerk's Office King
County, Washington, Feb. 7, 1942. [12]

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL

To the Honorable Superior Court of the State of
Washington for King County:

The petition of Union Mutual Fire Insurance Company, a corporation, defendant in the above entitled action, shows that heretofore and on or about January 17, 1942, the above-entitled action, which is an action of a civil nature, was brought in this court by the above named plaintiff against your petitioner as defendant. That your petitioner at the time of the commencement of said action was, ever since has been, and still is a foreign corporation, created by and existing under and by virtue of the laws of the State of Rhode Island, and a non-resident of the State of Washington. That the

plaintiff, Northwestern Mutual Fire Association, at the time of the commencement of said action was, ever since has been, and still is a corporation duly incorporated under the laws of the State of Washington. That said action is one of a civil nature in which there is a controversy wholly between citizens of different states, plaintiff being a citizen and resident of the State of Washington, and the defendant a citizen and resident of the State of Rhode Island.

That the amount in dispute in said action, exclusive of interest and costs, is the sum of \$38,461.54.

[13]

That in said action the plaintiff seeks to recover from the defendant on the ground and for the reason that the defendant has failed to perform its alleged obligation under a reinsurance contract entered into between the parties.

That said action is pending undetermined in this court and that the time has not yet arrived in which this defendant is required by the laws of the State of Washington or the rules of the Superior Court of the State of Washington for the County of King, the court in which this action is brought, to answer or otherwise plead to the complaint of the plaintiff, and that no application has been made to any court or judge for the order to be applied for in this petition.

That your petitioner desires to remove this action before the trial thereof, and within thirty days from the date of the filing of this petition, into the District Court of the United States for the district in

which this action is pending, to-wit, the District Court of the United States for the Western District of Washington, Northern Division, and your petitioner makes and files with this petition a bond with good and sufficient surety thereon for its entering in said District Court of the United States within thirty days from the date of the filing of this petition, a copy of the record in this action, and for its paying all costs which may be awarded by the said District Court of the United States for the Western District of Washington, Northern Division, if said District Court shall hold that this action was wrongfully or improperly removed thereto.

And your petitioner prays that said surety and said bond may be accepted and that this action may be removed into the District Court of the United States for the Western District of Washington, Northern Division, pursuant to the statutes of the United [14] States in such cases made and provided, and that no further proceedings may be had herein in this court except the order to remove as required by law, and that your Honorable Court make an order approving said bond and an order for the removal of this action, and to that end your petitioner will ever pray.

BOGLE, BOGLE & GATES

Attorneys for Petitioner, Union
Mutual Fire Insurance Com-
pany.

to execute the within bond, as Surety, are held and firmly bound unto Northwestern Mutual Fire Association, a corporation, its successors and assigns, in the penal sum of Five Hundred Dollars (500.00) lawful money of the United States, for the payment of which sum well and truly to be made unto the said Northwestern Mutual Fire Insurance Association, a corporation, its successors and assigns, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

This bond is upon the condition, nevertheless, that

Whereas, said Union Mutual Fire Insurance Company, a corporation, the principal obligor herein and the defendant in the above-entitled action, has filed its petition in the above-entitled action in the Superior Court of the State of Washington for King County for the removal of a certain cause therein pending, wherein the said Northwestern Mutual Fire Association, a corporation, is [17] plaintiff, and the said Union Mutual Fire Insurance Company, a corporation, is defendant, to the District Court of the United States for the Western District of Washington, Northern Division;

Now, therefore, if the said Union Mutual Fire Insurance Company, a corporation, shall enter in said District Court of the United States for the Western District of Washington, Northern Division, within thirty days from the filing of the petition for the removal of said cause, a copy of the record in said action, and shall well and truly pay all costs that may be awarded by the said District Court of the United States for the Western Dis-

trict of Washington, Northern Division, if the said District Court shall hold that said action was wrongfully or improperly removed thereto, then this obligation shall be null and void, otherwise it shall remain in full force and effect.

In witness whereof, said Union Mutual Fire Insurance Company, a corporation, as principal, and said Saint Paul-Mercury Indemnity Company of Saint Paul, a corporation, as surety, have caused this instrument to be executed by their proper officers thereunto duly authorized this 6 day of February, 1942.

UNION MUTUAL FIRE INSURANCE COMPANY, a corporation,

By BOGLE, BOGLE & GATES

Principal.

Its Attorneys.

SAINT PAUL-MERCURY INDEMNITY COMPANY OF SAINT PAUL, a corporation,

By CASSIUS E. GATES

Its Attorney-in-Fact.

[Endorsed]: Copy hereof received this Feb. 6, 1942.

SHANK, BELT, RODE & COOK
Surety.

[Endorsed]: Filed in County Clerk's Office, King County, Washington Feb. 6, 1942. [18]

[Title of Superior Court and Cause.]

NOTICE OF PETITION AND BOND
FOR REMOVAL.

To: Northwestern Mutual Fire Association, a corporation, the Plaintiff above named, and to Shank, Belt, Rode & Cook, its attorneys:

You and each of you will please take notice that the defendant Union Mutual Fire Insurance Company, a corporation, will file in the above entitled court and action on February 6, 1942, its petition and bond for the removal of said action from the above entitled court to the District Court of the United States for the Western District of Washington, Northern Division, a copy of which said petition and bond are attached hereto, and that on February 9, 1942 at 9:30 o'clock A. M., or as soon thereafter as counsel may be heard, said defendant will apply to the above entitled court at the court room of the presiding judge thereof in the County Court House of King County, being the County-City Building in Seattle, Washington, for an order of removal as prayed for in said petition.

BOGLE, BOGLE & GATES
Attorneys for Defendant.

[Endorsed]: Copy hereof received this Feb. 6, 1942.

SHANK, BELT, RODE & COOK

[Endorsed]: Filed in County Clerk's Office King County, Washington Feb. 6, 1942. [19]

[Title of Superior Court and Cause.]

ORDER ON REMOVAL.

At this time comes the defendant above named, Union Mutual Fire Insurance Company, a corporation, and presents a petition asking for the removal of the above entitled action from the Superior Court of the State of Washington for King County to the District Court of the United States for the Western District of Washington, Northern Division, which petition sets forth the reason for said removal, to-wit:

That this action is of a civil nature, and that the amount in dispute, exclusive of interests and costs, is the sum of \$38,461.54; that the controversy in this action is between citizens of different states, plaintiff being a citizen and resident of the State of Washington, and defendant being a citizen and resident of the State of Rhode Island.

And it appearing from said petition that said action is pending undetermined in this court and that the time has not yet arrived at which this defendant is required by the laws of the State of Washington or the rules of the Superior Court of the State of Washington for King County, the Court in which this action is brought, to answer or plead to the complaint of the plaintiff, and that no application has previously been made to any Court or judge [20] for the order applied for in said petition, and it further appearing to this Court that said Union Mutual Fire Insurance Company, a corporation, has presented a bond to this Court as provided by law, and it further appearing to this

Court that said bond and petition are sufficient to authorize the removal of said action to the District Court of the United States for the Western District of Washington, Northern Division;

Now, Therefore, It Is Hereby Considered, Ordered and Adjudged That said bond be, and it is hereby, accepted and approved, and that this Court proceed no further in this action, and that the same be, and it is hereby transferred to the District Court of the United States for the Western District of Washington, Northern Division, and that the clerk of this Court prepare and file a complete copy of the records of this Court in the above entitled action and certify to the same as a copy of said record, and forward the same to the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, at Seattle, in the County of King, and State of Washington, within thirty days from the filing of the petition herein.

Dated at Seattle, Washington, in open court, this 9th day of February, 1942.

CLAY ALLEN

Judge.

Presented by:

CHARLES F. OSBORN

Of Bogle, Bogle & Gates

Attorneys for Defendant.

[Endorsed]: Copy hereof received this Feb. 6, 1942.

SHANK, BELT, RODE & COOK

[Endorsed]: Filed in County Clerk's Office, King County, Washington Feb. 9, 1942. [21]

[Title of Superior Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD
ON REMOVAL.

To the Clerk of the Above Entitled Court:

Union Mutual Fire Insurance Company, a corporation, the defendant above named, appearing specially herein and not otherwise, hereby requests that you forthwith prepare and certify a true and correct copy of the record in the above entitled action for transmission to the United States District Court for the Western District of Washington, Northern Division, within thirty (30) days from February 9, 1942, the date of the entry of the order on removal herein; said copy of the record to include all the files, pleadings, affidavits, bonds and orders herein.

Dated this 17 day of February, 1942.

BOGLE, BOGLE & GATES

Attorneys for defendant Union Mutual Fire Insurance Company, a corporation, appearing specially herein and not otherwise.

[Endorsed]: Filed in County Clerk's Office, King County, Washington Feb. 17, 1942. [22]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD IN SUPERIOR COURT.

State of Washington,
County of King—ss.

I, Carroll Carter, County Clerk of King County and ex-officio Clerk of the Superior Court of the State of Washington in and for King County, do hereby certify that the foregoing is a full, true and correct transcript of the entire and complete record and files, including full, true and correct copies of journal and minute entries not substantially embodied in said files, in Cause No. 333131, entitled Northwestern Mutual Fire Association, a corporation, vs. Union Mutual Fire Insurance Company of Providence, Rhode Island, a corporation, as the same now appear on file and record in said cause in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the Superior Court this 27 day of February A. D., 1942.

[Seal] CARROLL CARTER,
County Clerk.

By /s/ RALPH C. PACKHURST
Deputy Clerk [23]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 480

NORTHWESTERN MUTUAL FIRE ASSOCIA-
TION, a corporation

Plaintiff,

vs.

UNION MUTUAL FIRE INSURANCE COM-
PANY of Providence, Rhode Island, a corpora-
tion,

Defendant.

AMENDED COMPLAINT.

Comes now the plaintiff and in accordance with
the order of this Court, and for cause of action
against the defendant, alleges:

I.

That the plaintiff now is and during all the times
hereinafter mentioned was a corporation duly in-
corporated under the laws of the State of Wash-
ington, and has paid its license fee last due to the
State of Washington.

II.

That the defendant now is and during all the
times hereinafter mentioned was a corporation duly
incorporated under the laws of the State of Rhode
Island, and duly admitted to do business within the
State of Washington.

III.

That on or about the first day of January, 1940, the parties hereto entered into a mutual agreement in writing, of which the following is a copy:

“REINSURANCE AGREEMENT

“Between the Union Mutual Fire Insurance Company, of Providence, Rhode Island, hereinafter called the reinsuring company, and the Northwestern Mutual Fire Association, of Seattle, Washington, hereinafter called [24] the reinsured company, issued effective January 1, 1940.

“Article I.

“Agreement to Cede and Accept Reinsurance. The reinsured company agrees to cede reinsurance to the reinsuring company and the reinsuring company agrees to accept reinsurance from the reinsured company on account of liability arising under policies, binders or entries of the reinsured company covering property located anywhere in the United States of America and/or the Dominion of Canada, subject to the following terms and conditions.

“Article II.

“Replaces Previous Agreement. This agreement is issued in lieu of and replaces the agreement between these companies which was issued effective January 1, 1931, and the terms of this agreement shall apply to all pro rata reinsurance between these companies regardless of the date of issue, excepting reinsurance placed by the Union Mutual Fire Insurance Company with the Northwestern Mutual Fire Association.

“Article III.

“Terms and Rates to Be Specified. Reinsurance shall be for such lengths of time and at such rates of premium as shall be specified in binder notices, daily reports and certificates issued hereunder.

“Article IV.

“Reinsurance To Be Void In Certain Contingencies. It is expressly understood and agreed that any reinsurance ceded hereunder shall be null and void if there exists, at the time of ceding at the office of the reinsured company having charge of the placing of [25] reinsurance, any knowledge of fire or other hazard affecting or threatening the risk to be reinsured, subject to modifications contained in Article IX of this agreement.

“Article V.

“Conditions Assumed By the Reinsured Company To Be Binding On the Reinsuring Company. The conditions of the reinsuring company’s reinsurance shall be identical with those of the reinsured company’s policies, and shall be subject to the same risks, conditions, valuations, endorsements, assignments, cancellations and transfers as are or may be assumed by the said reinsured company; provided, however, that the reinsuring company shall be promptly notified in writing of all changes of a reinsured policy of said reinsured company affecting title, location, amount, rate or term of risk.

“Article VI.

“Reinsuring Company Has Right To Decline and To Cancel. The reinsuring company has the right

to cancel any reinsurance by written or telegraphic notice, in which case liability shall terminate not later than noon on the 10th business day following the date of receipt of such notice by the reinsured company or upon the effective date of recession to any other company or companies, whichever event shall first occur; except that if the reinsured company shall begin the cancellation of its policy within the said ten business day period the reinsurance, upon notice to the reinsuring company, shall continue until such policy cancellation is effected. [26]

“Any request for cancellation of any risk or risks shall specify the insured’s name, city and state, to the extent that the reinsuring company has received such information from the reinsured company.

“The reinsured company shall have the right to cancel any reinsurance by written or telegraphic notice and in the event of such cancellation the liability shall terminate upon the date specified in the notice.

“It is the intent of this article to provide for the cancellation of the individual cessions but if the reinsuring company demands cancellation of all the risks assumed, or all of any given classification, or all in any city, such cancellation period upon immediate request therefor by the reinsured company, shall be extended to thirty days; provided, however, such ten days notice shall be sufficient if there exists a delinquency in the payment of account or default in the performance of any obligation hereunder which has not been remedied by the reinsured com-

pany within ten days after specific notice of intention to cancel because of such delinquency or default.

“A request by the reinsuring company for a reduction of any cession shall be subject to the foregoing provisions applicable to requests for cancellation.

“Article VII.

“Liability of Reinsuring Company; Entries, accounts and Settlements of Reinsurance; How and When Made. Reinsurance hereunder shall be ceded on the daily report and account current plan. The effective time of each cession shall be that of the reinsured policy unless a later time be specified in the binding notice [27] or reinsurance daily report. Liability shall be made effective by the specific written designation of the reinsuring company by the reinsured company. Reinsurance daily report or binding notice shall be mailed, telegraphed or given to the reinsuring company not later than the close of the next business day following the day of receipt of notice of its liability by the reinsured company; otherwise the reinsuring company shall not be liable upon such cession until such notice is mailed, telegraphed or given.

“The reinsured company shall pay to the reinsuring company on each cession a pro rata share of all original premiums or additional premiums applicable to the policy reinsured and the reinsuring company shall refund a pro rata share of each return premium. Each pro rata share of additional or return premium or dividend on any individual transaction shall be waived if such share is less than 50 cents

and where so waived no report is necessary. Cancellation by the reinsured company of a cession without cancellation of the policy of the reinsured company may be made at any time on a pro rata basis.

“An account current shall be rendered within fifteen days after the close of each month by the reinsured company and the balance thereunder shall be paid by the debtor upon such account within sixty days after the close of the month to which such account applies.

“Article VIII.

“Kinds of Business Reinsured; Cessions Permitted. This agreement shall apply to any kind of [28] insurance or reinsurance business written by the parties hereto, without limitation as to class, excepting excess and catastrophe reinsurance and excepting—No other exceptions—.

“Cessions hereunder shall in no case and at no time on one risk exceed \$25,000 nor the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company; except in specific cases subject to the approval of the reinsuring company; provided, (1) the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company; (2) the requirement for net retention will be deemed complied with if the reinsured company shall have its required amount of insurance (a) on building or buildings, (b) on the contents of the buildings, (c) on buildings and contents combined.

“Article IX.

(Article IX omitted for the reason that the same is marked “Void.”)

“Article X.

“Liability of the Reinsuring Company to Continue Beyond Expiration. The reinsuring company agrees to continue liability under any binder, certificate or entry ceded hereunder for a period of 30 days following the expiration of such binder, certificate or entry, provided:

“(1) The policy, certificate, or entry of the reinsured company, reinsured by such binder, certificate or entry, is continued beyond expiration either by [29] renewal or binder,

“(2) The reinsuring company has not received notice that reinsurance is no longer required, prior to the expiration of the said 30 days.

“(3) This liability is to be for an amount not exceeding the amount named in the original binder, certificate or entry, and

“(4) Should the policy, certificate or entry reinsured be renewed for a less amount, the liability of the reinsuring company shall be renewed in the same proportion as under the original entry.

“Article XI.

“Rates; Allowances for Expenses. The rates upon which this contract is based and upon which premiums hereinafter are to be computed shall be as follows:

“Reinsurance hereunder shall be ceded at the same rates as are charged on the policies reinsured.

"This agreement is subject to Plan "C" following:

"Plan 'A': The reinsured company shall receive in its monthly accounts an allowance of ...% of premiums ceded and shall make return allowance at the same rate on any return premiums. The reinsuring company shall also allow the reinsured company by way of reimbursement of the reinsured company's 'dividend' or 'saving' to policyholders an amount equal to ...% on all reinsurance premiums earned which shall become payable at the termination of each cession, and shall be accepted by the reinsured company as full settlement of all claims for dividend or unabsorbed premium returns; such allowance, however, shall be applicable only to [30] policies on which the reinsured company shall pay a 'dividend.'

"Plan 'B': The reinsured company shall receive in its monthly accounts an allowance of ...% of premiums ceded and shall make return allowance at the same rate on any return premiums. The reinsuring company shall also allow and pay the reinsured company by way of reimbursement of the reinsured company's 'dividend' or 'saving' to policyholders an amount equal to ...% of the net premiums ceded by the reinsured company during the same month of the preceding year which shall be settled and paid upon the entry thereof in each month's account current. A return payment at the same rate shall be applicable to any excess of return premiums over premiums.

“Plan ‘C’: The reinsuring company shall allow the reinsured company an amount equal to 52½% of the reinsurance premiums hereunder and the reinsured company shall make a return allowance at the same rate on all return premiums. Such allowance shall cover both commissions and dividends, and shall be in lieu of reimbursement for taxes, rating, and audit bureau fees.

“Article XII.

(Article XII omitted for the reason that the same is marked “Void.”)

“Article XIII.

“Reporting Losses. All losses which may occur on reinsurance ceded under this agreement shall be reported to the reinsuring company as soon as possible after advice thereof has been received by the reinsured company. Such reports shall give the estimated proper- [31] tion of the reinsuring company’s loss.

“Article XIV.

“Adjustment of Liability to Conform to Agreement for Net Retention by the Reinsured Company. If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the provision for net retention provided for in Article VIII been complied with.

“Article XV.

“All Loss Adjustments by the Reinsured Company Binding on the Reinsuring Company. All loss settlements made by the reinsured company, whether under strict policy conditions or by compromise or otherwise, shall be binding upon the reinsuring company, and the reinsuring company's proportion of the loss shall be payable to the reinsured company upon presentation of reasonable evidence of the amount paid by the reinsured company in settlement of the loss.

“Whenever the pro rata share of loss and loss expense upon any loss shall be less than \$1.00, claim for such loss and expense shall be waived.

“Article XVI.

“Insolvency of the Reinsured Company. In the event of the insolvency of the reinsured company, any claim for reinsurance hereunder shall be payable to the liquidator or receiver of the reinsured company [32] on the basis of the claim or claims allowed against the insolvent reinsured company by any court of competent jurisdiction or any justice or judge thereof, or by an receiver having authority to determine and allow such claims.

“Article XVII.

“Reinsuring Company Liable for Its Proportion of Adjustment Expenses. The reinsuring company shall be liable for its share of all expenses incurred by the reinsured company in connection with the investigation and settlement or contesting of the validity of claims or alleged losses, provided that no legal expenses shall be incurred without notice

to and consent of the reinsuring company. The reinsuring company, if it elects so to do, may pay its proportion of any claim against the reinsured company should the reinsuring company prefer not to be a party to the legal test on the part of the reinsured company, and thereupon be discharged from any and all further liability on account of such claim. The reinsuring company shall be entitled to participate in any sums which may be received by the reinsured company, either as salvage or otherwise, except in cases of sums recovered where the reinsuring company may have elected not to be a party with the reinsured company in incurring expenses in connection with such recovery.

“Article XVIII.

“Assessment Liability. The reinsured company shall not be a member of or be subject to the By-Laws of the reinsuring company or be subject to any liability for assessment. [33]

“Article XIX.

“Right to Examine Records. The reinsuring company shall have the right to examine at the office of the reinsured company any books, documents, reports or records referring to the risks reinsured under this agreement, at any time while this agreement is in force or within twelve months after the termination of liability or the final settlement of all losses on such reinsurance.

“Article XX.

“Arbitration. In case of any dispute arising be-

tween the parties hereto with respect to any transaction under this agreement, either company may request in writing that the dispute be referred to arbitration. Thereupon each company shall name an arbitrator, who must be an executive officer of a fire insurance company who is not an officer or director of either party to this agreement. These two arbitrators shall choose an umpire before entering upon arbitration, and shall forthwith notify the contracting parties of such choice of umpire.

“If the two arbitrators fail to agree upon an umpire within thirty days of their appointment, new arbitrators shall be appointed in conformity with this article.

“Each party shall submit its case within 30 days of notice of the selection of the umpire. The arbitrators and the umpire shall be relieved from all judicial formalities and shall interpret the present agreement as an honorable engagement. Their decision, or that of a majority of them, shall be final and binding upon the parties hereto. The arbitrators shall [34] give their award in writing at the earliest convenient date, but not later than sixty days from the end of the thirty day period provided for the submission of the case by the companies.

“The cost of arbitration and the award shall be at the discretion of the arbitrators or of one arbitrator and the umpire, as the case may be, who may direct to and by whom and in what manner same shall be paid.

“Article XXI.

“Termination of Agreement. This agreement is

unlimited as to its duration, and may be terminated as to the further acceptance of reinsurance at any time by either party giving to the other party thirty days prior written notice of such termination.

“In case of notice of termination the reinsuring company shall continue to participate in all reinsurance coming within the terms of this agreement, granted or renewed by the reinsured company during said thirty day period and the provisions of this agreement shall govern all liability of one party to the other arising out of reinsurance ceded under this agreement until the final expiration or cancellation of such reinsurance nad until the final settlement of all amounts due or payable by one party to the other.

“In Witness Whereof the parties hereto have caused these presents to be executed effective this first day of January, 1940.

“NORTHWESTERN MUTUAL
FIRE ASSOCIATION

“UNION MUTUAL FIRE IN-
SURANCE COMPANY [35]

“J. J. BEALL (Signed)

Vice-President

“L. D. BRILL (Signed)

Secretary

“C. A. MOSES (Signed)

Vice-President

“C. H. CADY (Signed)

Sec.

IV.

During the year 1940 the Washintgon Toll Bridge Authority was constructing a single span suspension bridge across the Tacoma Narrows, said bridge being known as the Tacoma-Narrows Bridge, and in the early part of June, 1940, this plaintiff notified the defendant thereof, and requested that the defendant would inform the plaintiff how much it was prepared to accept from the plaintiff by way of reinsurance on the risk, and upon June 10, 1940, this plaintiff sent to the defendant a telegram in words and figures as follows:

“Seattle, Washington
June 10, 1940

“Union Mutual Fire Insurance Company
10 Weybosset Street
Providence, Rhode Island

“Please refer our letter May 31st Washington Toll Bridge Authority - Tacoma Narrows Bridge. Further information just received indicates PML about 50%.

“We will retain \$50,000. Please wire your authorization.

Northwestern Mutual Fire Association”

On June 11, 1940, the plaintiff received from the defendant a telegram in words and figures as follows, to-wit:

“EAN 11 11 SER-WUX Providence RI
June 11 1940 1040 A
Northwestern Mutual Fire Assn.

Authorize \$50,000 Washington Toll Bridge
Authority Tacoma Narrows Bridge.

Union Mutual Fire Ins Co C H CADY
827 AM" [36]

Also on June 17 this plaintiff received from the
defendant a letter of which the following is a copy:

"Union Mutual Fire Insurance Company
Executive Offices, Grosvenor Building
Providence, Rhode Island

June 11, 1940

"Northwestern Mutual Fire Ass'n.

Third Ave. & Pine St.

Seattle, Washington

Washington Toll Bridge Authority

Gentlemen:

"In reply to your telegram and in confirma-
tion of ours of even date we authorize you to
bind \$50,000. reinsurance of your company cov-
ering the above bridge. Kindly let us know the
date you wish this authorization bound.

"Very truly yours,

"/sd/ C H CADY
Secretary"

CHC:MBC"

V.

This plaintiff on or about the same time also re-
ceived acceptances from other insurance companies
of reinsurance similar to the reinsurance above
mentioned, in the aggregate sum of \$250,000.00, so

that in the latter part of June, 1940, this plaintiff had acceptance from the defendant and other insurance companies of reinsurance to that above specified in the aggregate sum of \$300,000.00, and relying upon the said acceptances of reinsurance of the defendant and other solvent insurance companies [37] this plaintiff executed and delivered to the Washington Toll Bridge Authority its Policy of insurance No. 614-3652, wherein it insured the said Washington Toll Bridge Authority against loss or damage by various risks therein specified upon the said Tacoma-Narrows Bridge and approaches (but excluding the administration building) in the sum of \$350,000.00, and thereafter sent to the said defendant its written notification that the plaintiff had ceded to the defendant \$50,000.00 of reinsurance upon the said policy of insurance in accordance with the defendant's authorization.

VI.

On November 7, 1940, the said insured property suffered considerable damage from a risk within the scope of the said policy, for which the said Washington Toll Bridge Authority made claim against this plaintiff to the full amount of the said policy as for a total loss, and this plaintiff thereafter did on August 21, 1941 in good faith pay to the said Washington Toll Bridge Authority in full compromise settlement of its claim against this plaintiff the sum of \$269,230.78, of which the share which the defendant should reimburse is the sum of \$38,461.54. The plaintiff did on or about the

21st day of August, 1941, deliver to the said defendant proof of loss on account of the matters and things aforesaid in the sum of \$38,461.54, and demanded the said sum of money, but the said defendant has failed and refused to pay the said sum, or any part thereof.

VII.

This plaintiff, in investigating, adjusting and compromising the said loss and in defending the litigation carried on between this plaintiff and the said insured on account of the said loss, necessarily expended the sum of \$11,810.20 of which the defendant's share is \$1687.18, and the said defendant has [38] not paid the said sum or any part thereof.

VIII.

That upon December 29, 1941, the plaintiff, through its duly authorized counsel, sent through the mail a letter addressed to the defendant, of which the following is a copy:

“December 29, 1941.

“Union Mutual Fire Insurance Company,
Grovesnor Building,
Providence, Rhode Island.

“Attention: R. P. Swan,
Assistant Vice President.

“Gentlemen:

“In re: The Washington Toll Bridge
Authority Loss—November 7, 1940.

“The Northwestern Mutual Fire Association

has turned over to us for handling the claim which they have against you for loss on the Tacoma-Narrows Bridge in the principal sum of \$38,461.54, on account of your Reinsurance Agreement. We have read the correspondence which has passed between you and Mr. J. J. Beall, Executive Vice President of the Association, and we fully agree upon his stand to the effect that they were clearly empowered under the terms of the Reinsurance Agreement existing between you to consider that this reinsurance involved not more than \$25,000 on a single risk. I therefore see no necessity of repeating his argument upon this point.

“However, we note in Article VIII of the Reinsurance Agreement that the limit of each risk is expressly subject to the exception of ‘specific cases subject to the approval of the reinsuring company.’ The files in this case disclose that the Association on May 31, 1940, sent to each of their various reinsurers, among which was [39] your company, a circular specifically describing this bridge as a single span suspension bridge. They received numerous specific authorizations from various reinsurers, but not having received any from you, on June 10, 1940, they sent a telegram to you, in which they asked that you ‘please wire your authorization.’ You replied to this telegram by a specific authorization of \$50,000.00, following it up by a letter of confirmation. In reliance upon

your specific authorization, and the other authorizations which they had received, the Association issued its policy dated July 1, 1940, in the sum of \$350,000.00, which they would most certainly not have done if they had not considered that an aggregate of their reinsurance authorizations, including your authorization of \$50,000.00, amounted to the full sum of \$300,000.00.

“We would therefore earnestly urge upon you their cession to you of \$50,000.00 reinsurance clearly comes within the exceptions of a specific case subject to your approval.

“We note that Article XX provides that either party may obtain arbitration upon this dispute. We would therefore ask if you desire to arbitrate this dispute. Please inform us at your early convenience.

“Yours very truly,

SHANK, BELT, RODE &
COOK,

By H. C. BELT (Sd)”

That thereafter on or about the sixth day of January, 1942, the said defendant answered the said letter by sending through the mail a letter addressed

to the duly authorized coun- [40] sel of the plaintiff, of which the following is a copy:

“January 6, 1941

“Air Mail

Mr. H. C. Belt

Shank, Belt, Rode & Cook

1401 Joseph Vance Building

Seattle, Washington

“The Washington Toll Bridge Authority Loss—November 7, 1940

“Dear Mr. Belt:

“With reference to your letter of December 29, regarding the Northwestern Mutual Fire Association’s claim in connection with the above loss, we have not at any time questioned the points which you mention, but have only questioned the Northwestern Mutual’s actual net retention on the risk as compared to their declared net line as indicated on the reinsurance certificate.

“We are not requesting arbitration of this matter but if the Northwestern Mutual desires to institute arbitration proceedings in accordance with the contract terms, we would ask that they notify us to this effect in order that proper steps may be taken.

“Very truly yours,

Union Mutual Fire Insurance
Company

(Signed) R. P. SWAN

Asst. Vice President”

That in and by the letters above mentioned, the said defendant waived the right to submit to arbitration the matters and things set out in the complaint herein. [41]

IX.

The plaintiff has done and performed all acts and things required by the said Reinsurance Agreement necessary to be done and performed by it.

Wherefore, this plaintiff prays judgment against the said defendant in the sum of \$38,461.54 with interest thereon at the rate of 6 per cent per annum from August 21, 1941 until paid, and upon \$1687.18, with interest thereon at the rate of 6 per cent per annum from the date of service of this complaint until paid, and for costs of suit.

JO D. COOK

SHANK, BELT, RODE & COOK

Attorneys for Plaintiff.

Copy Received April 10, 1942.

BOGLE, BOGLE & GATES

[Endorsed]: Filed April 11, 1942. [42]

[Title of District Court and Cause.]

DEFENDANT'S REQUEST FOR
ADMISSIONS UNDER RULE 36

The defendant herein, Union Mutual Fire Insurance Company of Providence, Rhode Island, a corporation, hereby requests the plaintiff herein, Northwestern Mutual Fire Association, a corporation, to

make the following admissions herein under Rule 36 of the Rules of Civil Procedure for the District Courts of the United States for the purpose of this action only and subject to all pertinent objections as to relevancy and materiality which may be interposed at the trial:

* *

14. On or about October 15, 1941, Mr. H. D. Heath, Assistant Secretary of Northwestern Mutual Fire Association, transmitted a letter from Seattle to Union Mutual Fire Insurance Company at Providence, in the form of Exhibit "13", which is hereto attached and by reference made a part hereof as though fully set forth herein.

* *

19. On or about December 29, 1941, Messrs. Shank, Belt, Rode & Cook transmitted a letter from Seattle to the Union Mutual Fire Insurance Company at Providence, in the form of Exhibit "18", which is hereto attached and by reference made a part hereof as though fully set forth herein.

* *

21. Each of the documents attached to and exhibited with [43] this request is genuine. [44]

EXHIBIT 13

copy letterhead of
Northwestern Mutual Fire Association
Northwestern Mutual Insurance Building
Pine at Third—Seattle

October 15, 1941.

Fire & Inland Marine
Claim Department

G. H. Thompson, Vice President
H. D. Heath, Assistant Secretary
Air Mail

Union Mutual Fire Insurance Company
Grosvenor Building
Providence, R. I.

Attention: Mr. R. P. Swan

Gentlemen:

—Washington Toll Bridge Authority
Loss November 7, 1940—

This loss has given rise to a number of unusual problems and the point raised in your letters of September 8 and October 10 are no less interesting than some of the questions that presented themselves to us in the actual adjustment of the loss. We are quite open-minded on the subject and can understand your position, yet at the same time we find it difficult to accept your reasoning as correct.

At no time has the Northwestern ever taken its excess contracts into consideration in establishing

net lines for reinsurance purposes. When we speak of our net line on a risk, we do so only in the sense of our net after all specific reinsurance is deducted. In the ordinary case, of course, the question would never arise in any event since the amount we would retain net on one risk would be considerably less than the \$30,000 limit in our excess catastrophe contract. Generally speaking, we believe that would be true of all companies, since they all carry some form of excess protection and so far as we know, none take their excess reinsurance into consideration in determining their net retentions. We ceded to you \$50,000 on your specific authorization, and it is our conscientious opinion that your payment should be predicated on that amount and should not be influenced by the existence of our catastrophe excess contract.

Even if we were to accept your contention as correct, we still cannot agree that you have used the proper method of calculating your payment. We call attention to Article XIV of our Reinsurance Agreement which reads as follows:

Adjustment of Liability to Conform to Agreement for Net Retention by the Reinsured Company. If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the pro-

vision for net retention provided for in Article VIII been complied with." [45]

If your payment were to be adjusted in accordance with the above provision in the contract, it would result in an upward revision in our final net loss and a similar downward revision in your proportion, as follows:

Northwestern's net	\$38,461.54	Union Mutual	
		Proportion	38,461.54
Excess contribution	7,615.39		
Final N.W. net	\$30,846.15		
Add 1/2 of excess	3,807.70	Deduct 1/2 of excess	3,807.70
Adjusted N.W. net	\$34,652.85		
		Adjust Union Mutual Proportion	\$34,653.84

As I have already indicated, it is not our wish to take an arbitrary stand on the question of whether or not there should be an adjustment. In view of the usualness of the situation, we are open-minded on it, although at the same time we hope you see our position. Before consideration can be given to that question, however, it would seem necessary to first decide how the adjustment, if any, should be made. We would appreciate it if you would review our figures in the light of the contract and let us know if you do not agree. We shall look forward with interest to your reply.

Yours very truly,

(Sgd) H. D. HEATH,
Assistant Secretary.

HDH:ho [46]

EXHIBIT 18

copy letterhead of
Law Offices
Shank, Belt, Rode & Cook
Suite 1401 Joseph Vance
Building
Seattle

Corwin S. Shank

Cable Address

Horatio C. Belt

“Shankwin

Alfred Rode

Jo Dudley Cook

Corwin P. Shank

Carl J. Watkins

December 29, 1941.

Union Mutual Fire Insurance Company
Grovesnor Building
Providence, Rhode Island.

Attention: R. P. Swan, Assistant Vice President.

Gentlemen:

In Re: The Washington Toll Bridge
Authority Loss—
November 7, 1940.

The Northwestern Mutual Fire Association has turned over to us for handling the claim which they have against you for loss on the Tacoma-Narrows Bridge in the principal sum of \$38,461.54, on account of your Reinsurance Agreement. We have read the correspondence which has passed between you and Mr. J. J. Beall, Executive Vice President of the Association, and we fully agree upon his

stand to the effect that they were clearly empowered under the terms of the Reinsurance Agreement existing between you to consider that this reinsurance involved not more than \$25,000 on a single risk. I therefore see no necessity of repeating his argument upon upon this point.

However, we note in Article VIII of the Reinsurance Agreement that the limit of each risk is expressly subject to the exception of "specific cases subject to the approval of the reinsuring company". The files in this case disclose that the Association on May 31, 1940 sent to each of their various reinsurers, among which was your company, a circular specifically describing this bridge as a single span suspension bridge. They received numerous specific authorizations from various reinsurers, but not having received any from you, on June 10, 1940 they sent a telegram to you, in which they asked that you "please wire your authorization". You replied to this telegram by a specific authorization of \$50,000.00, following it up by a letter of confirmation. In reliance upon your specification authorization, and the other authorizations which they had received, the Association issued its policy dated July 1, 1940, in the sum of \$350,000.00, which they would most certainly not have done if they had not considered that an aggregate of their reinsurance authorizations, including your authorization of \$50,000.00, amounted to the full sum of \$300,000.00.

We would therefore earnestly urge upon you their cession to you of \$50,000.00 reinsurance clearly

comes within the exceptions of a specific case subject to your approval.

We note that Article XX provides that either party may obtain arbitration upon this dispute. We would therefore ask if you desire to arbitrate this dispute. Please inform us at your early convenience.

Yours very truly,

SHANK, BELT, RODE &
COOK.

By H. C. BELT.

HCB:wm

[Endorsed]: Filed Nov. 25, 1942. [47]

[Title of District Court and Cause.]

PLAINTIFF'S ANSWER TO DEFENDANT'S
REQUEST FOR ADMISSIONS UNDER
RULE No. 36

The plaintiff Northwestern Mutual Fire Association, a corporation, does hereby admit that each and all of the statements contained in the defendant's request for admissions under rule 36 are true and correct with the exception that the said plaintiff denies that the said exhibits are correct in the following particulars:

I.

Exhibit "4" shows signature of C. H. Cady.

II.

The various superficial stamps shown on Exhibit "6" were not on said document when it was transmitted to the defendant.

III.

Exhibits "10," "12," "15," and "17" show signatures of R. P. Swan.

IV.

Exhibit "19" bore date actually of January 6, 1941. It was, however, actually received by the addressee on or about January 8, 1942.

H. C. BELT.

SHANK, BELT, RODE &
COOK,

Attorneys for Plaintiff.

Copy received Dec. 4, 1942.

BOGLE, BOGLE & GATES.

[48]

State of Washington,
County of King—ss.

G. H. Thompson, being first duly sworn, upon oath deposes and says:

That he is Vice President of the above named plaintiff corporation; that he has read the foregoing answer to defendant's request for admissions under rule No. 36, knows the contents thereof, and believes the same to be true.

G. H. THOMPSON.

Subscribed and sworn to before me this 4th day of December, 1942.

[Seal] H. C. BELT,
Notary Public in and for the State of Washington, resident at Seattle.

[Endorsed]: Filed Dec. 4, 1942. [49]

[Title of District Court and Cause.]

DEPOSIT AND TENDER OF
RETURN PREMIUM

To: Northwestern Mutual Fire Association, the Plaintiff above named, and to its attorneys of record herein, Messrs. Shank, Belt, Rode & Cook, and to the Clerk of the Above Entitled Court:

You and Each of You Are Hereby notified that, Whereas, the above entitled court on June 14, 1943, rendered its oral decision herein in favor of the defendant and against the plaintiff, holding that the actual net retention of the plaintiff on the Tacoma Narrows Bridge was \$32,000.00, instead of \$50,000.00, and that, under Article XIV of the Treaty of January 1, 1940, between plaintiff and defendant, the amount reinsured by the plaintiff with the defendant must be considered to be \$32,000.00: and

Whereas, despite the fact that the defendant is under no legal obligation to pay a return premium

with respect to said reinsurance, and despite the further fact that the plaintiff has never demanded credit for a return premium but, on the contrary, has notified the defendant that there is no return premium due, the defendant nevertheless desires, in view of the court's decision, to adjust the reinsurance premium on the basis of a \$32,000.00 cession; now, therefore,

The defendant, Union Mutual Fire Insurance Company, without prejudice to or waiver of any of its legal rights in this cause, hereby deposits in the registry of the above entitled court for the benefit of the plaintiff, Northwestern Mutual Fire Association, and hereby tenders to the plaintiff the sum of \$121.58.

That the amount of said tender is computed on the basis of a gross return premium of \$216.00; 52½% of this gross amount has been deducted as a credit to the defendant in accordance with Article XI of said Treaty, leaving a net return premium of [50] \$102.60. To this latter amount has been added interest at six per cent per annum from the date of said cession to date hereof, making a total amount of \$121.58, which is the amount of this deposit and tender.

The clerk of the above entitled court is hereby authorized and directed to pay said sum of \$121.58 to the plaintiff or its attorneys of record herein upon obtaining proper receipt therefor.

Dated at Seattle, Washington, this 19th day of June, 1943.

UNION MUTUAL FIRE IN-
SURANCE COMPANY,

By BOGLE, BOGLE & GATES,
RAY DUMETT,

Its Attorneys of Record
herein.

Copy hereof received this June 19, 1943.

SHANK, BELT, RODE &
COOK.

E

[Endorsed]: Filed June 22, 1943. [51]

[Title of District Court and Cause.]

DEFENDANT'S AMENDED ANSWER TO
PLAINTIFF'S AMENDED COMPLAINT

Comes now the defendant above named and for amended answer to plaintiff's amended complaint herein admits, denies and alleges as follows:

I.

Answering paragraphs I, II, III and IV of said amended complaint, admits the same.

II.

Answering paragraph V of said amended complaint, admits that the plaintiff executed and de-

livered to the Washington Toll Bridge Authority its policy of insurance No. 614-3652, wherein it insured the said Washington Toll Bridge Authority against loss or damage by various risks therein specified upon the Tacoma Narrows Bridge and approaches (but excluding the Administration Building) in the sum of \$350,000.00, and further admits that the plaintiff thereafter sent to the defendant written notification that the plaintiff had ceded to the defendant \$50,000.00 reinsurance upon said policy of insurance; but the defendant denies each and every other allegation in said paragraph contained, except to the extent that the same are hereinafter expressly admitted in the defendant's affirmative defense herein. [52]

III.

Answering paragraph VI of said amended complaint, admits that on November 7, 1940, the said insured property suffered considerable damage from a risk or risks within the scope of said policy; further admits that the Washington Toll Bridge Authority made claim against the plaintiff in the full amount of the said policy as for a total loss; further admits that the plaintiff on August 21, 1941, paid to said Washington Toll Bridge Authority in full compromise settlement of its claim against the plaintiff the sum of \$269,230.78; further admits that the plaintiff on or about August 21, 1941, delivered to the defendant claim of loss in the sum of \$38,461.54, and demanded that the defendant pay said sum to the plaintiff; and further admits that the defendant has refused to pay said sum

or any sum in excess of \$24,615.38; but this defendant denies each and every other allegation in said paragraph contained, and further particularly denies that the share which the defendant should reimburse the plaintiff is the sum of \$38,461.54, as alleged in said paragraph, or any sum in excess of \$24,615.38.

IV.

Answering paragraph VII of said amended complaint, admits that the plaintiff, in investigating, adjusting and compromising the said loss and in defending the litigation carried on between the plaintiff and the said insured on account of said loss, necessarily expended the sum of \$11,810.20; and further admits that the defendant has not paid the sum of \$1,687.18, alleged in said paragraph to be defendant's share of the total sum so expended; but the defendant denies each and every other allegation in said paragraph contained, and particularly denies that the defendant's share of said expense is \$1,687.18, as alleged in said paragraph, or any sum in excess of \$1,008.93. [53]

V.

Answering paragraph VIII of said amended complaint, admits that on or about December 29, 1941, the plaintiff, through its counsel, sent through the mail a letter addressed to the defendant in the form set forth in said paragraph; further admits that on or about the 6th day of January, 1942, the defendant sent through the mail a letter addressed to said counsel for the plaintiff in the form

set forth in said paragraph; but the defendant denies each and every other allegation in said paragraph contained.

VI.

Answering paragraph IX or said amended complaint, denies each and every allegation therein contained.

FIRST AFFIRMATIVE DEFENSE

Further answering plaintiff's amended complaint herein, and by way of Affirmative Defense thereto, the defendant alleges as follows:

That the plaintiff's amended complaint herein fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Further answering plaintiff's amended complaint herein, and by way of an Affirmative Defense thereto, the defendant alleges as follows:

I.

That at all times mentioned in the plaintiff's amended complaint herein the Reinsurance Agreement set forth in paragraph III of said amended complaint was, and still is, in full force and effect.

II.

That Article VIII of said Reinsurance Agreement provides, [54] amongst other things, that cessions of reinsurance thereunder shall in no case and at no time on one risk exceed \$25,000.00 nor the

amount retained net, without reinsurance, by the reinsured company, as its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company. That by the terms of said Article VIII the plaintiff, in making the cession of \$50,000.00 of reinsurance mentioned in paragraph V of the amended complaint herein, was required to retain net, as provided in said Article, an amount of not less than \$50,000.00. That the plaintiff in making said cession represented to the defendant that it was retaining \$50,000.00 net of said insurance, as provided in said Article. That, relying upon the terms of said Reinsurance Agreement and believing and relying upon said representation of the plaintiff, the defendant approved said cession of \$50,000.00. That at the time said cession was made the plaintiff, contrary to its said representation and in violation of said Article VIII and without notifying the defendant thereof, reinsured all but \$32,000.00 of the total insurance of \$350,000.00 covered by plaintiff's said Policy No. 614-3652, mentioned in paragraph V of the amended complaint herein; and the amount of said insurance then, and at all times thereafter, retained net by the plaintiff, without reinsurance, at its own risk and liability under Article VIII of said Reinsurance Agreement was only \$32,000.00; whereas under the terms of said Article VIII the plaintiff, in ceding said \$50,000.00 of reinsurance to the defendant, was required to retain net at all times, without reinsurance, at its own risk and liability, an amount not less than \$50,000.00

of said insurance. That the defendant had no notice or knowledge of the plaintiff's said violation of Article VIII of said Reinsurance Agreement, or of the plaintiff's failure to comply with its said representation, until a date subsequent to the [55] loss of the Tacoma Narrows Bridge, to-wit, on or about October 1, 1941.

III.

That, in view of the fact that the actual amount of said insurance retained net by the plaintiff, under said Article VIII, was only \$32,000.00 instead of \$50,000.00, as required by said Article, the maximum amount of such insurance which the plaintiff was authorized by said Reinsurance Agreement to cede to the defendant was only \$32,000.00.

That Article XIV of said Reinsurance Agreement provides as follows:

“Adjustment of Liability to Conform to Agreement for Net Retention by the Reinsured Company

If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the provision for net retention provided for in Article VIII been complied with.”

That, in view of the facts aforesaid and of the provisions of said Article XIV, the amount actu-

ally due from the defendant to the plaintiff herein, including defendant's share of the loss alleged in paragraph VI of plaintiff's amended complaint and defendant's share of the investigation, adjustment and litigation expenses alleged in paragraph VII of said amended complaint, is the sum of \$25,-624.31, which sum the defendant has at all times been ready and willing to pay the plaintiff. That the defendant hereby tenders to the plaintiff said sum of \$25,624.31, plus interest at six per cent per annum to June 21, 1942, or a total amount of \$26,-897.55, which tender is hereby made without prejudice to, or waiver of, the defendant's objections and defenses to the claim of [56] the plaintiff herein for any amount in excess of the amount so tendered; and it is hereby agreed that the plaintiff's acceptance of the amount hereby tendered shall be without prejudice to, or waiver of, the excess of the plaintiff's claim herein over and above the amount so tendered. That the amount so tendered, if not accepted by the plaintiff, will be forthwith deposited by the defendant in the registry of the above-entitled Court.

IV.

That the defendant has done and performed all acts and things required of it by the said Re-insurance Agreement.

Wherefore, having fully answered the amended complaint of the plaintiff herein, defendant prays that the above-entitled cause be dismissed with

prejudice and that the defendant have and recover its costs and disbursements herein to be taxed.

BOGLE, BOGLE & GATES,
RAY DUMETT,

Attorneys for Defendant.

[Endorsed]: Filed Dec. 3, 1942. [57]

[Title of District Court and Cause.]

LEAVE TO DEPOSIT TENDER OF RETURN
PREMIUM

Now on this 22nd day of June, 1943, Jo D. Cook of the firm of Shank, Belt, Rose & Cook, appearing for the plaintiff, and Ray Dumett appearing as counsel for the defendant, this cause comes on before the court for entry of findings of fact, conclusions of law and judgment. On oral motion of the defendant company, leave is granted for the defendant company to deposit and tender of return premium in the sum of \$121.58.

Findings of fact and conclusions of law are signed.

Judgment and decree is signed. [58]

[Title of District Court and Cause.]

DOCKET ENTRIES

* * *

June 22, 1943—Filed Deposit and Tender of
Return Premium (\$121.58)

That a copy of said treaty is set forth on pages 1 to 13, inclusive, of plaintiff's amended complaint herein.

IV.

That Article VIII of said treaty of January 1, 1940, provides, among other things, that cessions of reinsurance thereunder by the plaintiff to the defendant shall in no case and at no time on one risk exceed \$25,000 nor the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company.

That Article VII of said treaty provides, among other things, that reinsurance ceded by the plaintiff to the defendant thereunder shall be ceded on the daily report plan.

V.

That during the year 1940 the Washington Toll Bridge Authority constructed a single-span suspension bridge across the Tacoma Narrows, near Tacoma, Washington, known as the Tacoma Narrows Bridge. That the plaintiff directly wrote \$350,000 of insurance on the Tacoma Narrows Bridge, insuring the Washington Toll Bridge Authority against loss or damage by various risks, including windstorm and collapse, upon the Tacoma Narrows Bridge and approaches (but excluding the Ad- [62] ministration Building). That the plaintiff specifically reinsured \$3000,000 of that amount with various insurance companies, including the de-

fendant, under the plaintiff's various reinsurance treaties.

VI.

That, in as much as the maximum amount which the plaintiff could cede to the defendant on one risk under Article VIII of said treaty was \$25,000, and since the plaintiff desired to cede to the defendant more than said maximum amount of reinsurance on the Tacoma Narrows Bridge, the plaintiff on June 10, 1940, wired the defendant asking for specific authorization to do so. That in said wire of June 10, 1940, introduced in evidence herein as Defendant's Exhibits A-1 and A-2, the plaintiff stated:

"Please refer our letter May 31 Washington Toll Bridge Authority — Tacoma Narrows Bridge. Further information just received indicates PML about 50 %.

"We will retain \$50,000. Please wire your authorization."

That on June 11, 1940, the defendant wired the plaintiff authorizing said cession of \$50,000 of reinsurance on the Tacoma Narrows Bridge. That said wire has been introduced in evidence herein as Defendant's Exhibit A-3.

VII.

That some time in June 1940 the plaintiff transmitted to the Defendant its Daily Report, or Certificate of Reinsurance, No. 10852 (introduced in evidence herein as Defendant's Exhibit A-5). That

in said daily report plaintiff stated to the defendant that it was ceding to the defendant \$50,000 of reinsurance on the Tacoma Narrows Bridge and approaches (but excluding the Administration Building) effective July 1, 1940. That in this daily report the plaintiff further stated to the defendant that the P. M. L. was 50% and that the plaintiff [63] "retains indential \$50,000".

VIII.

That the plaintiff's statement in its said wire of June 10, 1940, that it would retain \$50,000, and the plaintiff's statement in said daily report No. 10852 that it was retaining "identical \$50,000", constituted warranties to the defendant that the plaintiff was retaining, under Article VIII of said treaty, \$50,000 net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the said reinsuring company. That the defendant, believing and relying upon the plaintiff's said warranties as it was justified in doing, authorized and approved said cession of \$50,000. That said cession by the plaintiff to the defendant was a cession of \$50,000 of reinsurance upon the Tacoma Narrows Bridge and approaches as one unit and risk, the single-risk maximum of \$25,000, designated by Article VIII of said treaty, being increased to \$50,000 by the above mentionel specific authorization and approval of the defendant, pursuant to and in accordance with the provision of Article VIII of said treaty permitting this to be

done in specific cases subject to the approval of the defendant. That the court finds that said reinsurance was not ceded to the defendant upon a two-risk or multiple-risk basis, but, on the contrary, was ceded on a one-risk basis.

IX.

That on November 7, 1940, the Tacoma Narrows Bridge suffered considerable damage from a risk within the scope of the insurance policy written by the plaintiff upon said bridge; and the Washington Toll Bridge Authority made claim against the plaintiff to the full amount of said policy as for a total loss. That a lawsuit for recovery of the claimed [64] loss was instituted by the Washington Toll Bridge Authority against the various insurance companies which had written direct insurance upon said bridge, and this suit was finally settled by the Authority and said direct insurers for a total amount of \$4,000,000, which was approximately 77% of the total amount of the direct insurance written upon said bridge. That this sum of \$4,000,000 was paid to the Washington Toll Bridge Authority by the various direct insurers.

That on August 25, 1941, the plaintiff wrote the defendant, confirming said settlement and enclosing proof of loss indicating payment due from the defendant to the plaintiff in the amount of \$38,461.54. That said proof of loss has been introduced in evidence herein as Defendant's Exhibit

A-6. That said proof of loss contains, among other things, the following statement:

“The net loss sustained by the reinsured company after deducting all reinsurance, was \$38,461.54 (prior to excess).”

That on September 8, 1941, the defendant wrote the plaintiff, acknowledging receipt of the plaintiff's said letter of August 25, 1941, and the enclosed proof of loss. That said letter of September 8, 1941, has been introduced in evidence herein as Defendant's Exhibit A-7. That in said letter the defendant stated:

“We have your letter of August 25, confirming adjustment of the above loss for a total amount of \$4,000,000 with \$5,200,000 of insurance to contribute, and enclosing proof of loss indicating payment due from the Union in an amount of \$38,461.54. We note that in the proof of loss you have shown the net loss sustained by the Northwestern as the same amount of \$38,461.54, but have indicated this net loss to be ‘prior to excess’.

“We do not understand exactly what this means, and would appreciate a further explanation on this point, as it was our understanding as indicated in certificate No. 10852 that the Northwestern retained absolutely net an amount of \$50,000 on this risk. If this is not the case and the Northwestern's net, [65] without reinsurance, is not \$50,000 and your actual loss will therefore be less than the

amount indicated, we would appreciate it if you would advise us exactly what your net loss will be on the risk."

That on October 1, 1941, the plaintiff wrote the defendant, answering the defendant's said letter of September 8, 1941. That said letter of October 1, 1941, has been introduced in evidence herein as Defendant's exhibit A-8. That in said letter the plaintiff stated in part:

"The facts of the matter are that at the time this policy was written and the reinsurance placed, the Northwestern had in effect a catastrophe excess reinsurance contract whereby we were reinsured to the extent of 90% of all loss in excess of \$30,000 in any one catastrophe, although in establishing our net line this fact was given no consideration whatsoever."

X.

That the excess of loss reinsurance contract referred to in the plaintiff's said letter of October 1, 1941, has been introduced in evidence in this case as Plaintiff's Exhibit 1. That said contract, which was executed between the plaintiff and Lloyd's, became effective on January 1, 1940, and at all times herein mentioned was and still is in full force and effect. That by the terms of said contract the plaintiff was reinsured for 90% of any net amount for which it might become liable in excess of \$30,000 in any one loss, but in no event to exceed \$200,000. That said contract applied to the Tacoma Narrows Bridge, and, as

applied to said bridge, constituted a type of reinsurance, known as excess of loss reinsurance.

XI.

That on October 10, 1941, the defendant wrote the plaintiff, acknowledging receipt of the plaintiff's said letter of October 1, 1941. That said letter of October 10, 1941, has been introduced in evidence herein as Defendant's Exhibit A-9. That this letter states in part: [66]

“On the basis of this information, it would appear that we have been overlined on this risk, as our reinsurance contract with you, under which you cede business to us, provides that cessions shall, in no case, exceed the amount retained net, without reinsurance by the Northwestern.

“On the basis of your letter, we believe that the actual net amount retained by the Northwestern without reinsurance was only \$32,000, instead of \$50,000 as indicated in the certificate, and, on the basis of the contract, our Union line should also have been not exceeding \$32,000, which, on the basis of an approximate 77% loss, would make our loss payment only approximately \$25,000, instead of \$38,461.54 as called for by the proof of loss submitted.”

XII.

That the purpose of the net retention provision in Article VIII of said reinsurance treaty of January 1, 1940, is to assure the reinsurer that the

ceding company will at all times have as much at stake, dollar for dollar, in the particular insurance as the reinsurer, since the reinsurer must depend upon the knowledge, judgment, diligence and good faith of the ceding company in investigating and appraising the risk, placing the original insurance and making investigations and adjustments in the event of loss.

XIII.

That, by virtue of the existence of said excess of loss reinsurance contrast between the plaintiff and Lloyd's (Plaintiff's Exhibit 1), the maximum liability of the plaintiff in the event of any one loss to the Tacoma Narrows Bridge was \$32,000; and the actual amount retained net under Article VIII of said treaty by the plaintiff, without reinsurance at its own risk and liability on the same property so reinsured by the plaintiff with the defendant, was at all time \$32,000; and these facts were readily determinable by, and known to, the plaintiff at the time it made said cession to the defendant. [67]

That the plaintiff, in making said cession of \$50,000 of reinsurance to the defendant, owed to the defendant an obligation of the highest good faith to correctly compute and advise the defendant of the plaintiff's actual net retention under Article VIII of said reinsurance treaty and to further advise the defendant of all relevant facts bearing upon said net retention and the nature of the risk. That the plaintiff did not inform the

defendant, as it should have done, that its actual net retention was \$32,000, and not "identical \$50,000" as represented and warranted to the defendant. That the defendant has been prejudiced by reason of said failure on the plaintiff's part. That, in view of the plaintiff's actual net retention of \$32,000, the plaintiff was without right or authority, under Article VIII of said treaty, to cede to the defendant more than \$32,000 of reinsurance on said bridge.

XIV.

That said reinsurance treaty of January 1, 1940, between the plaintiff and the defendant provides in Article XIV as follows:

"Adjustment of Liability to Conform to Agreement for Net Retention by the Reinsured Company. If in case of loss it should appear that the amount ceded to the reinsuring company is in excess of the amount authorized in Article VIII hereof, the amount reinsured with the reinsuring company shall be reduced in such manner that the liability of the reinsuring company shall not exceed the amount for which it would have been liable had the provision for net retention provided for in Article VIII been complied with."

That the defendant was and is entitled to demand, as it did demand, that its liability with respect to such reinsurance be adjusted in accordance with the provisions of said Article XIV. That had the provision governing net retention in Article

VIII of said treaty been complied with by the plaintiff, the defendant would have been ceded \$32,000 of reinsurance and would have been liable for its pro rata share of the loss, [68] computed on the basis of a \$32,000 cession. That the court finds that the amount of defendant's liability to the plaintiff with respect to said reinsurance must be determined under the Article XIV on the basis of a \$32,000 cession.

XV.

That the amount of defendant's actual liability to the plaintiff, computed in accordance with Article XIV of said reinsurance treaty, was \$25,624.31. That said amount, plus interest at 6% per annum to June 21, 1942, or a total amount of \$26,897.55, was tendered and paid by the defendant to the plaintiff on June 20, 1942, and was accepted by the plaintiff on that date. That it was stipulated and agreed, however, by the parties hereto that said payment was made and accepted without prejudice to, or waiver of, the plaintiff's claim for any amount in excess of the sum so paid, and without prejudice to, or waiver of, the defendant's objection and defenses to the plaintiff's claim for any amount in excess of the sum so paid. That the plaintiff has been fully paid by the defendant all the plaintiff is entitled to receive from the defendant.

XVI.

That during the trial herein the court permitted the plaintiff to make a trial amendment to its amended complaint herein as follows:

“X.

“That, under the usages and custom of the insurance business and in the insurance world, the term ‘net retention’ or the term ‘amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company’s does not include and has no application to any catastrophe excess insurance, and that such catastrophe excess insurance is not considered in arriving at such net retention.”

That the court, out of an abundance of caution, provisionally permitted the plaintiff to introduce testimony to [69] support the allegations of said trial amendment and permitted the defendant to introduce evidence in rebuttal thereto. That the court finds that the terms of Article VIII of said treaty of January 1, 1940 are plain, clear and unambiguous and do not permit of modification, amendment or interpretation by extrinsic evidence. That the court further finds that in any event, under the customs and usages of the insurance business and in the insurance world, the term “amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company”, as used in Article VIII of said treaty, does ~~not~~ include and does apply to excess loss of reinsurance such as Plaintiff’s Exhibit 1, and means what it says, namely: the

amount retained net by the reinsured company at its own risk and liability on the same property reinsured by the reinsured company with the reinsuring company after deducting all reinsurance, including excess of loss reinsurance such as Plaintiff's Exhibit 1.

XVII.

That the plaintiff introduced testimony to support its contention that the term "P. M. L." ("probable maximum loss"), as used in its wire of June 10, 1940, and its daily report No. 10852, indicated two risks; and the defendant introduced testimony in rebuttal thereto. The court finds from a preponderance of the evidence that the contention of the plaintiff in this regard is not sustained, and further finds that said term did not and does not indicate two risks or a multiplicity of risks as applied to the facts and circumstances in this case.

Done in open court this 22nd day of June, 1943.

(Signed) JOHN C. BOWEN

United States District Judge.

[70]

From the within and foregoing Findings of Fact the Court, being fully advised in the premises, now makes and enters the following

CONCLUSIONS OF LAW

I.

That the plaintiff is entitled to no recovery from the defendant herein. That the defendant is entitled to a judgment and decree herein dismissing this cause, together with the complaint and amended

complaint upon which the same is based, with prejudice and with costs to the defendant.

Done in open court this 22d day of June, 1943.

(Signed) JOHN C. BOWEN

United States District Judge

Presented by:

RAY DUMETT

of Bogle, Bogle & Gates
Attorneys for Defendant.

Copy hereof received this June 19, 1943.

SHANK, BELT, RODE & COOK
E.

[Endorsed]: Filed June 22, 1943.

In the District Court of the United States for the
Western District of Washington, Northern Division.

No. 480

NORTHWESTERN MUTUAL FIRE ASSOCIATION, a corporation,

Plaintiff,

vs.

UNION MUTUAL FIRE INSURANCE COMPANY, of Providence, Rhode Island, a corporation,

Defendant.

JUDGMENT AND DECREE

The above entitled cause having come on regularly for trial before the undersigned Judge of the

above entitled Court, sitting without a jury, on December 29 and 30, 1942, and said trial continuing on March 3 and 4, 1943, the plaintiff appearing by its attorneys of record, Messrs. Shank, Belt, Rode & Cook and Mr. Jo Cook, and the defendant appearing by its attorneys of record, Messrs. Bogle, Bogle & Gates and Mr. Ray Dumett; both parties having introduced their evidence and having rested; written briefs having thereafter been served and filed by both parties and both parties having thereafter orally argued the cause; the court at the conclusion of the oral argument having orally announced its decision in favor of the defendant and against the plaintiff; and the court having heretofore duly made and entered its Findings of Fact and Conclusions of Law herein, and being fully advised in the premises; now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiff take nothing by its complaint and amended complaint herein, and that the above entitled cause, and the complaint and amended complaint upon which the same is based, be and the same are hereby dismissed, with prejudice; and it is further

Ordered, Adjudged and Decreed that the defendant do have [72] and recover herein from the plaintiff its costs and disbursements herein to be taxed.

Done in open court this 22nd day of June, 1943.

(Signed) JOHN C. BOWEN

United States District Judge.

Presented by:

RAY DUMETT

of Bogle, Bogle & Gates

Attorneys for Defendant.

[Endorsed]: Filed June 22, 1943. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given That Northwestern Mutual Fire Association, a corporation, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth District from the final judgment entered in this action on June 22, 1943.

Dated at Seattle, Washington, this 8th day of September, 1943.

JO D. COOK

H. W. BELT

Attorneys for Appellant

Northwestern Mutual Fire
Association, a corporation.

[Endorsed]: Filed Sept. 9, 1943. [74]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents: That we, Northwestern Mutual Fire Association, a corpora-

tion, as Principal, and National Surety Corporation, a corporation of the State of New York, authorized to become sole surety on bonds in the State of Washington, as Surety, are held and firmly bound unto Union Mutual Fire Insurance Company, of Providence, Rhode Island, a corporation, Defendant above named, as Obligee, in the penal sum of Two Hundred And Fifty And no/100s (\$250.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs, administrators, successors and assigns, jointly and severally, firmly by these presents.

Dated and Sealed this 7th day of September, 1943.

Whereas, on the 22nd day of June, 1943, the above entitled Court rendered and entered final judgment in the above entitled cause in favor of the above named Obligee.

And Whereas, said Northwestern Mutual Fire Association, a corporation, Plaintiff, feeling aggrieved by said judgment and desiring to appeal from the same to the Circuit Court of Appeals for the Ninth District and perfect said appeal by this bond;

Now, Therefore, the Condition of the Above Obligation is Such: That if the said appellant will pay all costs and damages that may be awarded against it on said appeal or on the dismissal thereof, not exceeding Two Hundred Fifty And no/100s

(\$250.00) Dollars, then this obligation shall be void; otherwise to remain in full force and virtue.

[Seal] NORTHWESTERN MUTUAL
 FIRE ASSOCIATION:

By: J. D. COOK,
 its attorney

 NATIONAL SURETY CORPO-
 RATION:

By: V. EVERS
 Attorney-in-Fact.

[Endorsed]: Filed Sept. 9, 1943. [75]

[Title of District Court and Cause.]

STATEMENT BY APPELLANT ON POINTS
ON WHICH IT INTENDS TO RELY.

Comes now the Northwestern Mutual Fire Association, the above named plaintiff and appellant, and makes this statement of the points on which it intends to rely on the appeal herein:

1. The evidence as introduced in this case shows that as a matter of law that the defendant at all times knew that the plaintiff had the catastrophe excess insurance which it had.

2. The evidence as introduced in this case shows as a matter of law that there was no risk (as such term is understood among insurance men in general) involved in the insurance of the Tacoma Narrows Bridge, at issue in this case, greater than fifty

per cent of such insurance, and such fact was duly communicated to the defendant.

3. The evidence as introduced in this case shows as a matter of law that according to the universal custom and usage in the re-insurance business, excess catastrophe insurance such as it appears herein that the plaintiff had, is never taken into account in computing the net retention of the reinsured.

[76]

4. Full premium for \$50,000.00 of reinsurance had been paid by plaintiff to defendant and, prior to judgment herein, no payment or tender of payment had been made by defendant to plaintiff on account of any reduction of such reinsurance.

5. Under the evidence in this case the trial court should have found for the plaintiff and entered judgment in its favor as prayed in the amended complaint.

JO D. COOK

H. C. BELT

Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed Sept. 10, 1943. [77]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF
CONTENTS OF RECORD ON APPEAL.

Comes now the above named plaintiff and appellant and designates the following portions of the

record proceedings and evidence to be contained in the record on appeal, to-wit:

1. Transcript of Record on Removal.
2. Amended Complaint.
3. Amended Answer to Amended Complaint.
4. Findings of Fact and Conclusions of Law.
5. Judgment and Decree.
6. Notice of Appeal.
7. Appeal Bond.
8. Appellant's Designation of Contents of Record on Appeal.
9. Plaintiff's Designation of Evidence to be Contained in Record on Appeal.
10. Statement by Appellant of Points on which it Intends to Rely.

JO D. COOK

H. C. BELT

Attorneys for Plaintiff and
Appellant.

[Endorsed]: Filed Sept. 10, 1943. [78]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS

This matter having come on regularly for hearing on the 27th day of September, 1943, upon the defendant's motion for transmission of original exhibits to the Circuit Court of Appeals pursuant to

Rule 75 of the Rules of Civil Procedure; the plaintiff having stated that it had no objection to the granting of said motion, and this Court being of the opinion that the original exhibits designated in said motion should be inspected by the appellate court and sent to the appellate court, in lieu of copies, now, therefore, it is hereby

Ordered that the Clerk of the above entitled Court be and he is hereby authorized and directed to transmit to the United States Circuit Court of Appeals for the Ninth Circuit the following original exhibits herein, to-wit: Exhibits A-14, A-15, A-16 and A-17, at the time that the record on appeal in this case is transmitted to said Court.

Done in open Court this 29th day of September, 1943.

JOHN C. BOWEN

Judge

Presented by

RAY DUMETT

of Counsel for defendant

Approved:

BOGLE, BOGLE & GATES

RAY DUMETT

Attys. for Deft.

SHANK, BELT, RODE & COOK & JO D.
COOK

[Endorsed]: Filed Sept. 29, 1943. [86-a]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing type-written transcript of record, consisting of pages numbered from 1 to 86 inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by the designation and counter designation of record on appeal filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same together with Agreed Designation of Evidence to be contained in Record on Appeal, which is sent up in original form as part of this record on appeal, together with certain original exhibits transmitted under separate certificate, constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate of return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Act February 11, 1925) for making record, certificate or return, 145 folios at .05c.....	\$ 7.25
and 96 folios at .15c	14.40
Appeal fee, (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record.....	.50
Certificate of Clerk to Original Exhibits.....	.50
Total.....	\$ 27.65
	[87]

I further certify that the foregoing fees have been paid by the attorneys for the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 13th Day of October, 1943.

[Seal] JUDSON W. SHORETT,
Clerk

By TRUMAN EGGER
Chief Deputy [88]

[Title of District Court and Cause.]

STIPULATION RE DESIGNATION OF EVIDENCE

It is hereby Stipulated by and between the parties hereto through their respective attorneys of record herein, that the attached document designated as Agreed Designation of Evidence to be contained in Record on Appeal, is the designation of

evidence to be contained in such Record agreed to by the parties hereto.

Dated this 15th day of October, 1943.

SHANK, BELT, RODE & COOK
JO D. COOK

Attorneys for Appellant

BOGLE, BOGLE & GATES
RAY DUMETT

Attorneys for Appellee.

Received Oct. 15, 1943. Office of Clerk, U. S.
District Court, Seattle, Washington.

[Endorsed]: Filed Oct. 15, 1943.

[Title of District Court and Cause.]

AGREED DESIGNATION OF EVIDENCE TO
BE CONTAINED IN RECORD ON AP-
PEAL.

Be It Remembered, that on the 29th day of December, 1942, at the hour of 2:00 o'clock p.m. the above entitled and numbered cause came on for trial before the Honorable John C. Bowen, one of the Judges of the above entitled court, sitting in Department No. 1 thereof, at the United States Courthouse, in the City of Seattle, County of King, State of Washington; the plaintiff appearing by its attorneys Messrs. Shank, Belt, Rode & Cook (by

Mr. H. C. Belt and Mr. Jo D. Cook), and the defendant appearing by its attorneys Messrs. Bogle, Bogle & Gates (by Mr. Ray Dumett); both sides having announced they were ready for trial; the Court having tendered the parties the right of a pre-trial if desired, and counsel for plaintiff and counsel for defendant having stated they did not desire a pre-trial;

Whereupon the following proceedings were had and testimony given, to-wit:

Counsel for both parties with approval of the Court, agreed that Defendant should offer its evidence first. [1*]

The Court: I will approve of that. Much has been said in the statements on both sides about custom. Is there any question between you as to whether or not that is sufficiently pleaded?

Mr. Dumett: I am glad your Honor asked that question, because it is our position that no evidence of custom or usage is admissible and that it is not material or relevant to this case, our position being the contract, the letters and documents sent pursuant to that contract, speak for themselves, are clear and unambiguous and do not admit of construction by evidence dehors the record, by extrinsic evidence, by proof of custom or anything else, and we further contend that any such evidence is inadmissible because not properly pleaded by the plaintiff. It is our position the plaintiff in its complaint relies on the contract, the written contract

* Page numbering appearing at top of page of original Reporter's Transcript.

between the parties, and it allows of no modification by extension or change, by proof of custom or usage, and we contend that is a collateral field because it is not within the pleadings and not within the issues. [1a]

DEFENDANT'S EVIDENCE

Defendant's Exhibits "A-1" to "A-9," inclusive, were offered by defendant and admitted in evidence, the material parts of which are as follows:

DEFENDANT'S EXHIBIT "A-1"

Seattle, Washington

June 10, 1940

Union Mutual Fire Insurance Company

10 Weybosset Street

Providence, Rhode Island

Please refer our letter May 31st Washington Toll Bridge Authority-Tacoma Narrows Bridge. Further information just received indicates PML about 50%.

We will retain \$50,000. Please wire your authorization.

Northwestern Mutual Fire Association

RFE gh

Day Letter

30 Words

11:10 A.M.

DEFENDANT'S EXHIBIT "A-2"

This is identical with Defendant's Exhibit "A-1."

DEFENDANT'S EXHIBIT "A-3"

Providence RI June 11, 1940

Northwestern Mutual Fire Assn

Third Ave & Pine St

Seattle Washington

Authorize \$50,000. Washington Toll Bridge Authority [2] Tacoma Narrows Bridge

Union Mutual Fire Insurance Co.

C. H. Cady

DEFENDANT'S EXHIBIT "A-4"

June 11, 1940

Northwestern Mutual Fire Ass'n.

Third Ave. & Pine St.

Seattle, Washington

Washington Toll Bridge Authority

Gentlemen:

In reply to your telegram and in confirmation of ours of even date we authorize you to bind \$50,000. reinsurance of your company covering the above

bridge. Kindly let us know the date you wish this authorization bound.

Very truly yours,

(Signed) C. H. CADY
Secretary.

CHC:MBC

DEFENDANT'S EXHIBIT "A-5"

Report of Reinsurance Placed by the
Northwestern Mutual Fire Association
Seattle, Washington
with

Union Mutual Fire Insurance Company
Providence, Rhode Island

on its policy or policies issued for the
term of

Annual Payment to Washington Toll Bridge
Authority etal

Northwestern retains (a) identical \$50000 (b) other
in or on \$. P.M.L. 50%. Protection.

[3]

Synopsis or Copy of Form
on Tacome Narrows Bridge and Approaches (but
excluding Administration Building), in the State
of Washington.

Assured's Address: Tacoma Narrows Bridge, Wash.
In accordance with your authorization

DEFENDANT'S EXHIBIT "A-6"

Reinsurance Proof of Loss

To the Union Mutual Fire Insurance Company
 of Providence, Rhode Island
 Insured Washington Toll Bridge Authority
 Location Olympia, Washington

Date of Loss	Time	Damaged by	Cause
11/7/40	10:30 A.M.	Wind	Wind

	Reinsured Co.	Reinsuring Co.
Claim No.	223937	
Policy No.	613-3652	10852
Policy Dates	7-1-40-41	7-1-40-41
Amount of Policy	\$350,000	\$50,000
Loss	\$269,230.78	\$38,461.54

Adjusting Expense	_____	_____
	\$	\$
Total Claim	_____	_____

Loss was paid by reinsured company on
 Date August 20, 1941

The net loss sustained by the reinsured company
 after deducting all reinsurance was \$38,461.54
 (prior to excess)

Dated at Seattle, Washington, August 21, 1941.

NORTHWESTERN MUTUAL
 FIRE ASSOCIATION.

(Signed) G. H. THOMPSON
 Vice-President

Subscribed and sworn to before me this 21st day
 of August, 1941. [4]

C. F. REYNOLDS
 Notary Public

DEFENDANT'S EXHIBIT "A-7"

September 8, 1941

Mr. H. C. Heath, Asst. Secretary
Northwestern Mutual Fire Association
Northwestern Mutual Insurance Building
Pine at Third
Seattle, Washington

Re: Washington Toll Bridge Authority
Loss November 7, 1940

Dear Sir:

We have your letter of August 25, confirming adjustment of the above loss for a total amount of \$4,000,000 with \$5,200,000 of insurance to contribute and enclosing proof of loss indicating payment due from the Union in an amount of \$38,461.54. We note that in the proof of loss you have shown the net loss sustained by the Northwestern as the same amount of \$38,461.54, but have indicated this net loss to be "prior to excess".

We do not understand exactly what this means, and would appreciate a further explanation on this point, as it was our understanding as indicated in certificate #10852 that the Northwestern retained absolutely net an amount of \$50,000 on this risk. If this is not the case and the Northwestern net without reinsurance is not \$50,000 and your actual loss will therefore be less than the amount indicated,

we would appreciate it if you would advise us exactly what your net loss will be on the risk.

Very truly yours,

UNION MUTUAL FIRE
INSURANCE COMPANY [5]

(Signed)

R. P. SWAN

Assistant Vice President

rps/leb

DEFENDANT'S EXHIBIT "A-8"

Northwestern Mutual Fire Association
Northwestern Mutual Insurance Building
Pine at Third—Seattle

October 1, 1941

Fire & Inland Marine

Claim Department

G. H. Thompson, Vice President

H. D. Heath, Assistant Secretary

The Union Mutual Fire Insurance Company

Grosvenor Building

Providence, Rhode Island

Gentlemen:

- WASHINGTON TOLL BRIDGE AUTHORITY
LOSS NOVEMBER 7, 1940 -

We have delayed in reply to your letter of September 8 in which you inquire about the net loss sustained by the Northwestern, waiting to see if any other companies made the same inquiry.

The facts of the matter are that at the time this policy was written and the reinsurance placed, the

On the basis of this information, it would appear that we had been overlined on this risk, as our reinsurance contract with you, under which you cede business to us, provides that cessions shall, in no case, exceed the amount retained net without reinsurance by the Northwestern.

On the basis of your letter, we believe that the actual net amount retained by the Northwestern without reinsurance was only \$32,000 instead of \$50,000 as indicated in the certificate and, on the basis of the contract, our Union line should also have been not exceeding \$32,000 which, on the basis of an approximate 77% loss, [8] would make our loss payment only approximately \$25,000, instead of \$38,461.54 as called for by the proof of loss submitted.

We would, therefore, appreciate it if you would give this matter further consideration based on these circumstances and we would then be glad to have your further comments.

Very truly yours,

UNION MUTUAL FIRE
INSURANCE COMPANY

(sgd) R. P. SWAN

Assistant Vice President

RPS:leb

J. M. LEGRIS,

called as a witness by the Defendant, first duly sworn, testified as follows:

Direct Examination

By Mr. Dumett:

Q. Will you state your name in full?

A. J. M. Legris.

Q. Where do you reside?

A. Providence, Rhode Island.

Q. What position do you hold with the defendant in this case, the Union Mutual Fire Insurance Company?

A. I am assistant secretary.

Q. And you have been for approximately how long?

A. I have not been assistant secretary for as many years as I have been with the company, but I have been with the company over twelve years, and assistant secretary for approximately two years.

Q. You have been with the company for twelve years?

A. Over twelve years. [9]

Q. State generally what the nature of your work has been with the company during those twelve years, what work have you done?

A. In the spring of 1930 I was employed by the Union Mutual Fire Insurance Company as office manager of that company, with responsible duties over all the work of the company with the exception possible of investment work, which is work in

(Testimony of J. M. Legris.)

the hands of the president, and those duties gave me responsibilities over all classes of work in the office, whether it were underwriting or whether it were a matter of losses or a matter of accounting and statistics.

Q. It covered the general field?

A. It covered the general field, yes sir. I was the general office manager of the company.

Q. You have also had some connection with the insurance department of the State of Rhode Island, have you not?

A. Yes, sir. I was first examiner and actuary for the State of Rhode Island from 1920 to 1930, ten years.

Q. Have you had some connection also with the National Association of Insurance Companies?

A. Well, as an employee of the State of Rhode Island in the position I have just stated I was a member of the National Association of Insurance Commissioners, especially as a member of the so-called Committee on Blanks, which has the responsibility of the preparation of all forms that are used for the filing of the annual statements by insurance companies of all types.

Q. Now I want to call your attention to certain documents we have here. I hand you first, Mr. Legris, a photostatic copy of a telegram which has been marked Defendant's Exhibit "A-1", purporting to be a wire dated June 10, I [10] think, 1940, from the Northwestern Mutual Fire Association to

(Testimony of J. M. Legris.)

the Union Mutual Fire Insurance Company. You recognize that wire, do you? A. Yes, sir.

Q. And also defendant's Exhibit A-2, purporting to be a wire dated June 10, 1940, from Northwestern Mutual Fire Association to the Union Mutual Fire Insurance Company. Do you recognize that?

A. Yes, sir.

Q. And then also Defendant's Exhibit "A-3", purporting to be a wire of June 11, 1940, from the Union to the Northwestern—the same answer to that one? A. Yes, sir.

Q. Now calling particular attention to those exhibits, to a certain portion in Exhibit "A-1", the statement in the wire from the Northwestern to the Union: "We will retain \$50,000", and in Exhibit "A-2", June 10, 1940, from the Northwestern to the Union "We will retain \$50,000. Please wire your authorization", and in Exhibit "A-3" from the Union to the Northwestern "We authorize \$50,000", I will ask you first whether in accepting and retaining this cession of \$50,000 of reinsurance, the Union placed any reliance upon the statements that the Northwestern was retaining net \$50,000?

A. Yes, sir.

Q. Was that statement as to net retention of importance to your company in making its decision?

A. It certainly was.

Q. Why?

A. Because net retention in underwriting means the amount that a company on an individual risk retains net for its liability [11] in case of a loss on

(Testimony of J. M. Legris.)

that particular risk, and so upon seeing the net retention of the Northwestern given as \$50,000 the Union then, upon the confidence of that net retention, knew how to underwrite that particular amount of reinsurance, and it underwrote it in a special way, taking cognizance of the fact that if the Northwestern, a financially much stronger company than the Union, could take \$50,000 net retention, the Union, less strong financially, could not of course keep \$50,000 and protect itself under its underwriting; all based upon the \$50,000 net retention stated given to the Union.

Q. Now calling your attention to another exhibit, if I may, to Exhibit "A-5", the statement: "Northwestern retains identical \$50,000", does what you have said apply to that also?

A. Exactly, yes sir.

Q. Do you recall the loss of the Tacoma Narrow bridge occurring about November 7, 1940?

A. Yes, sir.

Q. Did you after that loss receive—did your company receive defendant's Exhibit "A-6", or the original of it?

A. Yes, sir.

Q. What is the date of that Exhibit A-6?

A. August 21, 1941.

Q. From the Northwestern to the Union?

A. Yes, sir; signed by Mr. Thompson, vice-president.

Q. I call your attention to the latter part of that exhibit which says: "The net loss so sustained by the reinsured company, after deducting all reinsur-

(Testimony of J. M. Legris.)

ance was \$38,461.54 prior to excess." Do you observe that? A. Yes, sir.

Q. Had your company at any time prior to the date it received Exhibit "A-6" been advised by the Northwestern of any excess [12] or any reinsurance affecting its net retention other than the net retention that had been previously given?

A. No, sir.

Q. Then I call your attention to Defendant's Exhibit "A-8" a letter from the Northwestern to the Union, in answer to the Union's letter of September 8, 1941, in which, among other things, it is stated by the Northwestern to the Union: "We have delayed in replying to your letter of September 8th in which you inquire about the net loss sustained by the Northwestern, waiting to see if any other company made the same inquiry.

The facts of the matter are that at the time this policy was written and the reinsurance placed, the Northwestern had in effect a catastrophe excess reinsurance whereby we were reinsured to the extent of 90% of all loss in excess of \$30,000 in any one catastrophe, although in establishing our net line this fact was given no consideration whatsoever."

Prior to the receipt of that letter of October 1, 1941, by your company, had your company been advised in any way by the Northwestern of this excess catastrophe reinsurance of which it speaks?

A. No, sir.

Q. Had you been advised, other than by this letter, of any reinsurance coverage that reduced

(Testimony of J. M. Legris.)

the net retention coverage of \$50,000 in any way?

A. No, sir.

Q. If your company at that time had been advised of the excess catastrophe reinsurance, and that the effect of this was to reduce the maximum liability of the Northwestern on the Tacoma Narrows bridge to \$32,000, instead of \$50,000, would [13] your company have approved this cession of \$50,000 to the Union?

A. It is very unlikely.

Q. If you had been advised of the actual facts at the time of the cession what would your company have done?

Mr. Cook: I think that is rather speculative, Your Honor.

The Court: The objection is sustained.

Q. Was the Union ever advised by the Northwestern prior to the loss of the Tacoma Narrows bridge that the Northwestern considered that this bridge involved two risks? A. No, sir.

Mr. Dumett: I believe you may examine.

Cross Examination

By Mr. Cook:

Q. What did the telegram in which the figures "extend PML 50%" mean to you? What did it mean to your company?

A. It meant to us that under circumstances of any loss the probable maximum loss might be 50%.

Q. Now, what has that to do in fixing the top limits of insurance which your company, or any other company, will write in one policy?

(Testimony of J. M. Legris.)

A. It has a lot to do with the amount of net retention that the company may keep upon a particular risk. It governs the underwriting of any particular risk.

A property may—there may be two properties involved, one a wooden property where the probable maximum loss might be the total property, and the company would underwrite that risk in a certain way, assuming just a small retention possibly, and there may be a brick building which is of good construction, and the company may not expect a loss [14] as large as on the wooden building, and the company would then retain more of an amount, because the probable maximum loss there is not as great as in the first place.

The probable maximum loss has only to do with the quality of the underwriting of a risk.

Q. You were familiar with the fact the contract between these two companies provided for a maximum of \$25,000 on one risk, were you not?

A. Yes, sir.

Q. Did you connect up this 50% PML in any way with the fact you were ceded \$50,000 on this particular risk?

A. No connection whatever.

Q. None at all? A. None at all.

Q. You stated you wrote this particular policy in a special way. In just what way did you write it?

A. A special way in this sense: The Union company is not as strong financially as the Northwestern. That is a known fact. The Northwestern

(Testimony of J. M. Legris.)

having retained \$50,000 upon that particular risk the Union could not, in its underwriting absorb a \$50,000 reinsurance as such, so the Union in its underwriting of that risk kept a certain portion of it as its net loss liability, and then reinsured the balance of the amount to protect itself in case a loss occurred.

Q. What were the amounts?

A. The amount of the net retention of the Union was \$15,000.

Q. And that was protected under what kind of a policy?

A. It was protected under an excess of loss of reinsurance, which was based on a net retention amount.

Q. Will you explain the difference between that kind of a policy and a catastrophe reinsurance policy? [15]

Mr. Dumett: What catastrophe reinsurance policy—yours, for instance?

Mr. Cook: Yes. You requested we bring this into court.

The Court: I think any document you ask the witness about should be first marked so the record will show what he is speaking of.

Mr. Cook: We may substitute a copy of this later?

The Court: If both counsel agree to it, you may.

Q. Will you refer to Plaintiff's Exhibit "1" here and see whether or not you are familiar with that type of catastrophe reinsurance contract?

(Testimony of J. M. Legris.)

The Court: We will take a ten-minute recess.

(After recess trial resumed as follows)

Q. (Mr. Cook) Now, Mr. Legris, have you examined plaintiff's Exhibit "1"?

A. I have examined it as much as I could in the short space of time.

Q. Are you familiar with that kind of a catastrophe reinsurance contract? A. I am.

Q. You have known of that kind of a contract from your experience in the insurance business?

A. For a good many years, yes.

Q. And do I understand it to be your contention here that that contract reduced the retention of the Northwestern to \$32,000 on the bridge?

Mr. Dumett: The one he has before him, counsel?

Mr. Cook: Yes.

A. From what I saw of it I would say it would reduce the net retention of the Northwestern. [16]

Q. That is the contention of your company in this law suit, is it not?

A. It is our contention the net retention of the Northwestern was not \$50,000, but \$32,000.

Q. Because of the existence of that contract?

A. Not because of the existence of that contract, because we knew nothing of it until we were told of it.

Q. For what reason do you claim their net retention was reduced to \$32,000?

A. It was reduced to \$32,000 because on the notice of loss, as shown by one of the exhibits, the

(Testimony of J. M. Legris.)

Northwestern stated that the amount of its net loss, prior to excess or—yes, not after excess—or prior excess—what is the wording there?

Q. Which exhibit do you refer to?

A. The exhibit on the loss.

Q. Do you refer to Exhibit “A-6”?

A. This states that the net loss sustained by the reinsured company, which is the Northwestern, after deducting all reinsurance, was \$38,461.54, and a statement prior to excess.

Q. That was dated what?

A. August 21, 1941.

Q. That was long before this litigation and before the dispute arose? A. Yes, sir.

Q. Do you recall having seen the original of this letter dated October 1, 1941, being Defendant’s Exhibit “A-8”?

A. Yes, sir.

Q. And will you refer to the last paragraph of that letter in which this matter of the excess is explained to your company? [17]

A. Here?

Q. Yes, sir.

A. All right.

Q. This paragraph advises your company that: “As matters turned out, of course, the claim was finally compromised for a figure close to 80% of the total insurance and our net loss, after deducting specific reinsurance, was \$38,461.54. Claim under our catastrophe excess contract was \$7,615.39, this being 90% of our net loss in excess of \$30,000.00.

“We trust this fully answers your question, although if there is any further information you would like to have kindly let us know.”

(Testimony of J. M. Legris.)

Do you recall having received that?

A. Yes, sir.

Q. And after the receipt of that letter and that information was when your company took the position that the catastrophe contract which you have now before you is the thing which reduced the Northwestern's retention from \$50,000 to \$32,000, is that not correct? A. Yes, sir.

Q. And we are agreed now that the basis of your company's contention in this case is that this specific contract, Plaintiff's Exhibit "1", is the thing which has reduced our retention from \$50,000 to \$32,000?

A. May I say something on that contract before I reply?

Q. I would like to have your answer first, and you may then explain, if necessary.

A. Of course in a general way I would say yes. It was on the basis of the contract stated to us that our company said that the net retention of the Northwestern was not \$50,000, [18] as stated to us, upon the reinsurance, but rather \$32,000.

Q. But let me ask you a question. Is there anything else besides this contract which you contend has reduced the retention from \$50,000 to \$32,000?

A. There can be nothing else, because that is the only reinsurance cover.

Q. All right; that is what I wanted to know.

Now, with that as a premise, I want you to assume that the amount retained by the Northwestern

(Testimony of J. M. Legris.)

had been \$25,000 instead of \$50,000, and knowing of the existence of this contract, what would be the net retention of the Northwestern?

A. The net retention of the Northwestern would have been \$25,000.

Q. It would have been? A. Yes.

Q. (Mr. Cook) What I am interested in is this, assume that instead of retaining by the Northwestern \$50,000, as we advised you we did, we had retained only \$25,000, and that we had a similar \$25,000 policy on the Lake Washington bridge, and that the same windstorm had wrecked both bridges; what would have been our retention on the Tacoma Narrows bridge?

A. It would have been stated in the statement of loss at \$25,000, and it would have been stated on the other one as \$25,000, and then your catastrophe contract, which called for an amount of loss not in excess of \$32,000, would have come into play, but it would not have disturbed your net retention in the beginning.

Your net retention is what you have in the beginning, [19] and comes in on that particular Tacoma Narrows bridge under that contract.

You gave us \$50,000 net retention, and you knew that if a loss occurred which was in excess of \$32,000 you would recover under that contract, so you had means of telling the reinsuring company that your net retention under that particular line was \$32,000 and not \$50,000.

Q. Suppose that this wind-storm which caused

(Testimony of J. M. Legris.)

this damage, instead of doing the amount it did, damaged that bridge up to 50% only, and the next day an earthquake damaged it the remainder of the 100%, so that it was a total loss, what would be the retention of the Northwestern?

A. The Northwestern's retention should be \$32,000, under a 50% risk.

Q. Under that statement of facts how would this policy come into effect?

A. That policy would not come into effect under those two losses.

Q. And what would be the retention of the Northwestern?

A. The retention of the Northwestern would have been the amount of its loss.

Q. \$50,000?

A. It would have been \$50,000.

Q. Then how prior to the time that a loss is incurred can you tell what your net retention is if you have to consider catastrophe excess?

A. You can always tell what your net retention is when you are assuming a risk as your net retention risk, which has an amount in excess of the net under the catastrophe coverage. [20]

Q. How can you tell that?

A. You can always tell. We have contracts like that in the Union.

Q. You say you can always tell. We have had one example here where you say our retention was \$32,000 because of the specific loss involved here, but had it been two losses separated by a day and

(Testimony of J. M. Legris.)

from different causes, our retention under those facts would have been \$50,000.

A. You mean your loss retention would have been.

Q. Our retention would have been \$50,00, you said?

A. That is the amount of your loss.

Q. And that is the amount of our policy?

A. You mean the amount of your policy—you had two different losses, and having two different losses you would have reported two individual losses, and the Union never would have had any way of telling whether or not actually you were retaining \$50,000 or any other amount.

The only way the Union was able to find out that actually the Northwestern had a net retention other than that stated to us in the underwriting was on that proof of loss, and that proof of loss—

Q. Let us go a little further. Suppose that we write a policy on a dwelling house for \$5,000, and \$2,500 of that is ceded to the Union, and you are advised that the retention of the Northwestern is \$2,500—do you follow me so far? A. Yes, sir.

Q. After that one house burns down completely, there has been a \$5,000 loss, \$2,500 of which is the Northwestern's? A. Yes, sir.

Q. And up to that point we have correctly stated our retention? A. Yes, sir. [21]

Q. Suppose that house was one of say fifty located in a block or two or three blocks, upon which we had similar policies, and all of them

(Testimony of J. M. Legris.)

burned down, what would have been our retention on that particular house?

A. The retention would have been considered—your retention on that, on that particular house, would have continued at \$2,500.

Q. If we had the fifty houses insured with a net retention of \$2,500 on each one, and they all fifty burned, there would be a loss of \$125,000, would there not? A. Yes, sir.

Q. The Northwestern would pay how much of that?

A. The net loss of the Northwestern would have been, under that contract, \$30,000 plus 10% of the excess up to the limit, whatever the amount may be.

Q. Would that then have affected, on the same theory you advance here, the net retention which we reported? A. No, sir.

Q. Why not?

A. Because the net retention in underwriting is not based on aggregate risk. It is based on individual risks, and that is what governs underwriting, on individual risks and nothing else.

And that is why a company, in accepting reinsurance, insists upon knowing the net retention of the ceding company, because that net retention tells the reinsuring company immediately what is the quality of the risk in the judgment of the ceding company, and the reinsuring company, on the basis of that judgment of the ceding company, underwrites [22] itself its reinsurance.

(Testimony of J. M. Legris.)

Q. But does it not also tell or indicate the number of risks involved?

A. It would if so stated, yes.

Q. No, whether stated or not. Assuming there is no statement, and that it comes through after this date on a 50% PML, does that not indicate to you in addition to the desirability of the risk, the number of risks involved? A. No, sir.

Q. Do you in ceding reinsurance tell the number of risks involved?

A. If there are risks involved we tell the number of the risks, because the underwriting is based on the number of risks.

Q. How do you advise of that?

A. That would be under the so-called reinsurance certificate.

Q. Where on the reinsurance certificate does that appear?

A. That would appear most likely in the remarks.

Q. Most likely? Do you not have any usual place for it to appear?

A. Offhand I cannot tell you exactly where it would appear, but it would appear on the reinsurance certificate if there were two individual risks.

Q. Two or more?

A. Two or more considered.

Q. I hand you Plaintiff's Exhibit "2" for identification.

Will you examine that and state whether or not.

(Testimony of J. M. Legris.)

that is a certificate of reinsurance ceded by the defendant to the plaintiff in this case?

A. Yes.

Q. I will ask you to state whether or not that discloses a total retention by the Union of \$127,800 fire and \$71,000 wind? A. It does. [23]

Q. Then what does it disclose under that risk that was ceded by the Union to the Northwestern?

A. The original figures were the total amount of \$141,999 wind, and \$255,600 fire.

Q. Those figures are about double the retention of the Union? A. Yes, sir.

Q. Now what PML does that disclose?

A. 5%.

Q. Is it five or 3%.

A. 5%.

Q. Where besides that 5% PML is there any method of determining the number of risks involved?

A. The net of the reinsurance itself tells the number of risks. This happens to be a reinsurance upon village properties, and village properties are made up of individual units, and this kind of insurance is well known as blanket insurance covering for convenience individual units which could just as well, in an inconvenient way, have had the insurance written on a par policy basis.

Q. I don't like to interrupt you, but my question was where besides the 5% PML is there disclosed the number of risks?

(Testimony of J. M. Legris.)

Mr. Dumett: The witness is explaining and he had not finished his answer.

A. The answer to your question is in the description of the risks covered.

Q. And is that the only place?

Mr. Dumett: Let him finish.

A. Because it says in here "On Buildings" and so on, of the type generally making up village properties, which are individual units.

Q. Any other place, Mr. Legris? [24]

A. I would say not. Not that I can see here.

Q. Is there any place there which discloses the fact that the Union carries catastrophe reinsurance of any kind which would affect your retention of the \$127,000 fire insurance?

A. There is nothing in this certificate, no.

Mr. Dumett: What is that?

A. The answer is no.

Q. (Mr. Cook) Yet you do carry that kind of insurance?

A. We carry catastrophe insurance, yes.

Q. And what are the limits on that?

A. Our general fire business, as stated in the answers our company furnished the court this morning, shows \$100,000 on the general fire business, as a first loss to the Union, before the catastrophe coverage comes into play.

Q. Now considering only that particular policy, the limit of your catastrophe reinsurance started at \$100,000 rather than \$30,000, as in this policy, Plaintiff's Exhibit "1", is that right?

(Testimony of J. M. Legris.)

A. Yes.

Q. So that in this particular form which you reported to us, had you sustained a loss of over \$100,000 your catastrophe policy would have come into play on that date, would it not?

A. It would.

Q. Did you report to us in your retention there the existence of any such policy? A. No, sir.

Q. What other policies besides this \$100,000 policy, do you carry which would affect a large loss on that?

Mr. Dumett: When, at what time?

Q. (Mr. Cook) What is the date of that particular policy? A. July 1, 1939. [25]

Q. As of the date of the issuance of that policy?

A. Will you repeat the question, please?

(Question read.)

On what?

Q. On that policy.

A. What type of loss?

Q. We will consider fire first.

A. Well, the fire, the answer has been given. The limit is \$100,000. The first loss of \$100,000 with a limit of liability of \$300,000.

Q. Was there no other policy of excess insurance in effect at that date which would have reduced a \$25,000 loss under that policy?

A. What kind of a loss?

Q. A fire loss. A. No, sir.

Q. None at all? A. None at all.

Q. The reason I ask that was the fact that on

(Testimony of J. M. Legris.)

this particular bridge insurance you said you had a policy which reduced your loss to \$15,000. Does that refer only to wind?

A. That particular reference of mine is a reference to a contract which applies to individual risks only. It really acts in the nature of pro rata reinsurance only, with this distinction, that before the pro rata reinsurance comes into play the company has to sustain a loss corresponding to the amount of its net retention under the particular reinsurance.

Q. Does that policy apply only to wind, is my question?

A. No. It applies to all risks written by the company.

Q. Included in that risk there are some buildings or units, or whatever they may be called, over \$15,000, are there not?

Mr. Dumett: Are you now leaving the bridge and [26] returning to the units?

Mr. Cook: It is plaintiff's Exhibit "2".

A. Without the schedule I could not tell you that answer. There is no reference to any units there.

Q. You would not be able to tell by looking only at this Exhibit "2"? A. No.

Q. Assuming that there was under this policy one building valued at \$25,000, which was destroyed, and then your second excess policy would have come into play under a loss?

A. No, sir; it would not.

Q. It would not? A. No, sir.

(Testimony of J. M. Legris.)

Q. Why not?

A. It would not come into play because that second contract you refer to is a contract particularly based on a net retention of the company, and before that contract pays anything to the Union upon the loss, the Union's net retention, which is a known fact, has to be exhausted by the loss.

Q. And in this particular case your net retention was what?

A. I think it is stated at 3% at the top and right above the amounts.

Q. Do you mean your net retention is not \$127,000, as shown on here?

A. Our net retention, under the particular policy, which is a policy covering a multitude of risks, is \$127,000.

Q. Where would the 3% come into play?

A. The 3% is 3% of the aggregate coverage under the insurance. The aggregate insurance of the Union under this particular policy is \$4,260,000. 3% of that is \$127,800. [27]

Q. Do I understand before this policy—this second excess policy,—would come into play you would have to pay the full \$127,000?

A. No; the excess of loss contract you are talking about now is not an automatic contract. It is a specific contract that only applies when it is actually used on a particular risk. It is not the general cover contract, but an individual risk contract.

Q. Does it require a specific endorsement for each risk?

(Testimony of J. M. Legris.)

A. It requires a specific endorsement for each risk, and I believe I could show you that. I have something in my papers that would show you just what I mean, but I think my words explain what I mean.

Q. What difference was there between the fire insurance referred to in Exhibit "2" and the wind insurance included in there, as far as reinsurance was concerned?

A. We retained—the amount of wind-storm insurance, as I recall the figures, was 50% of the fire coverage. The net retained by the Union on the wind-storm is, I believe, 50%.

Q. You may refer to it again and tell the court how much wind-storm insurance you retained under Exhibit "2"?

A. We retained—the figure I gave was wrong. We retained \$71,000 of the maximum coverage on wind-storm. There is supposed to be an endorsement of wind-storm here, and I can't find it.

Q. I am interested in the amounts there.

A. Our retained amount was \$71,000 on wind-storm, which would be three per cent of the total amount of wind-storm coverage.

Q. Regardless of the total amount your retention was \$71,000?

A. That is right. [28]

Q. Assume that under that policy there had been a \$50,000 loss from wind, how much would the Union have had to pay?

A. A \$50,000 loss?

Q. Yes, sir.

(Testimony of J. M. Legris.)

A. The Union's loss would have been \$1500.

Q. I see your point. I am mistaken on that. Suppose a loss had been sufficiently large to take up \$50,000 of your \$71,000 retention, how much would you have had to pay? A. \$18,500.

Q. Why would you have had to pay only \$18,500 instead of the full \$50,000?

A. Because the loss would have involved so many of these individual units under this insurance that the catastrophe coverage in the aggregate on the individual units would have come into play.

Q. And would have reimbursed you for all of that in excess of \$18,500? A. Yes, sir.

Q. Where in that daily report to the Northwestern did you disclose that under those circumstances your net retention would have been only \$18,500 instead of \$71,000? A. Nowhere.

Q. Why did you not do it?

A. Because this particular type of coverage is a coverage which is not an individual unit coverage; but is a coverage on a multitude of risks.

Q. The real reason is you could not tell until after a loss whether your excess contract would ever come into play or not, is that not true?

A. That is true.

Q. It would be physically impossible for you to report any [29] other net retention than \$71,000?

A. That is true.

Q. Because you could not determine it until the loss occurred? A. That is right.

Q. And your distinction, as I get your testimony,

(Testimony of J. M. Legris.)

between your situation where you did not report and the Northwestern's ceding to you this bridge insurance, is that you assumed there was one risk instead of more? A. That is right.

Q. That is the only difference in the two cases?

A. Yes, sir.

Q. Now, Mr. Legris, how long has the Union been taking reinsurance from the Northwestern?

A. Within records I have, since 1928. I believe—it may have been prior to that, but I have records since 1928.

Q. At least since 1928? A. Yes, sir.

Q. And there has been during the same time insurance ceded by the Union to the Northwestern?

A. Yes, sir.

Q. Is it not a fact during all that time there have been many limits in excess of your \$25,000 limit covered in your contract ceded to you?

A. Our contract?

Q. In the contract in this case which we were reading here—didn't you hear it—Article 8?

A. Yes, sir; I recall.

Q. Which provides in no event at any one time on one risk shall it exceed \$25,000?

A. Yes, sir; I recall now.

Q. There have been many, many instances in which more than \$25,000 [30] have been ceded to you by the Northwestern?

A. Not without special authority.

Q. Not without special authority?

A. Because under the contract no reinsurance

(Testimony of J. M. Legris.)

could be ceded to the Union in excess of \$25,000 retention on any one risk.

Q. Do you know that positively?

A. That has been looked up in our records and to the best of my knowledge that is so.

Q. How besides the estimated PML, which is put on the report, do you have any way of knowing how many risks there are involved on this insurance that is ceded to you by the Northwestern?

A. The question would not be raised upon reinsurance, unless the amount ceded were in excess of the amount permitted under the contract.

Thereupon Plaintiff's Exhibit "2" was admitted in evidence. The material portions of said Plaintiff's Exhibit "2" are as follows: [31]

~~141,999.~~ W
141,999. W

Begins July 1 '39 Expires July 1 '42 Amt. ~~255,600~~ F.
[Stamped]: 12-25-41 (750) √ 2

Report of Reinsurance Placed by the
Union Mutual Fire Insurance Company (147)
Providence, Rhode Island
with

Northwestern Mutual Fire Association
Seattle, Wash.

For reinsurance on its Policy 01-121

Issued to West Point Manufacturing Company

Var. Locations
of Alabama

and covering in accordance with synopsis or copy of
form attached

[In Pencil]: 263 F

Reinsured Company's rate of Div.		73 W
Class 10-FP	Pro Const	PML 5%
	3%	71,000. W
Reinsured Co. retains on identical property		127,800. F

(Testimony of J. M. Legris.)

Reinsured Co. has net contents same premises

Reinsured Co. has net building same premises

SYNOPSIS OR COPY OF FORM

West Point Manufacturing Company

\$ 4,260,000.00 On all buildings, principally dwelling, garages, schools, grandstands, bandstands, boarding houses, churches, community houses and farm property, including additions, extensions and projections; all equipment appertaining thereto including fences; and all contents, not otherwise insured, including awnings, casts, curiosities, implements, medals, models, patterns, pictures, scientific apparatus, signs, store, office furniture and fixtures, sculpture, tools, while contained in or adjacent to the above mentioned buildings operated and controlled by the assured, and the interest of the assured in and/or legal liability for similar property belonging in whole or in part to others, and held by the assured either sold but not removed, in storage or for repairs or otherwise held, situated on the premises of the assured as described below, this amount to be divided and to apply as follows:

Item	Amount	
1.	\$ 4,256,002.	On all buildings and contents, as described above, constituting the mill village of the assured situate in Fairfax; Langdale; Shawmut; Lanett; Riverdale; West Point Utilization West Point Power Co., Alabama, subject to the following limits of liability for each village:—
		Fairfax \$ 833,363.
		Langdale 894,714.
		Shawmut 704,301.
		Lanett 1,422,373. 1,431,373
		Riverdale 300,171.
		West Point
		Utilization 39,951.
		West Point
		Power Co. 61,129.
		<hr/>
		\$4,256,002.

(Testimony of J. M. Legris.)

2. 3,998. On any other buildings or contents thereof, belonging to the assured and not included in the schedule of property prepared by the assured, or on any newly erected or acquired buildings or contents thereof to apply for an amount not exceeding \$600. on the one story, shingle roof, frame dwelling, situated about 6½ miles south from West Point, Chambers County, Alabama and known as "Smith Farm" and \$500. on any other building. Provided the assured notifies this company within thirty (30) days of the erection or acquiring of said buildings.

\$ 4,260,000. Total

This policy also covers miscellaneous buildings at or near the assured's manufacturing plants or elsewhere in the assured's manufacturing towns, not otherwise insured, but does not cover mill warehouses or sprinklered buildings or any property which is otherwise specifically insured.

It is understood and agreed that any buildings as described in this policy which may be built or acquired by the assured during the term hereof shall be included in this insurance in the same manner as tho they had been specifically described at the time this policy was originally issued and this policy is also extended to include any building material and supplies to be used in the construction of new buildings and shall also cover any contractors interest in buildings being erected or in materials therefore and also contractors tools and equipment being used in the construction of new buildings.

Windstorm Endorsement attached.

(Testimony of J. M. Legris.)

Attached to and forming part of Policy No. 01-121 of the Union Mutual Fire Ins. Co.

Dated: July 1, 1939.

Q. (Mr. Cook): Have you examined Plaintiff's Exhibit "3" for identification? A. Yes.

Q. Will you refer to the first page of that exhibit and tell the Court what it is?

A. This is a certificate of reinsurance placed by the Northwestern with the Union, applying to insurance beginning October 7, 1940, [32] to expire October 7, 1941, showing \$40,000 ceded to the Union known as the Mead and Mount Construction Company, et al, of a town suburban to Denver, Colorado.

Q. Will you refer to Defendant's Exhibit "A-5", which was introduced here, being the certificate of reinsurance covering the Tacoma Narrows bridge, and tell me whether or not those two are on identical forms?

A. Substantially so,—not exactly so.

Q. Defendant's Exhibit "A-5" is a photostatic copy of the form which was sent to the Union, is that not correct? A. Yes, sir.

Q. And Plaintiff's Exhibit "3" contains the carbon copy of copies of similar certificates which are retained by the ceding company, or the Northwestern? A. That is right.

Q. Is that correct? A. That is right.

(Testimony of J. M. Legris.)

Q. In that first certificate what was the Union advised that the net retention of the Northwestern was? A. \$40,000.

Whereupon adjournment was had until December 30, 1942, when the trial was resumed as follows, to-wit:

Q. (Mr. Cook): Mr. Legris, we were discussing last night Plaintiff's Exhibit "3". Will you refer to that again (handing Exhibit "3" to the witness)? The first page of that exhibit cedes to the Union how much insurance? A. \$40,000.

Q. And it advises the Union that the Northwestern retains how much?

A. \$40,000 on the same risk, and \$20,000 on another risk here. [33] I can't quite read the list.

Q. The \$40,000 is fire, you mean?

A. Yes, sir; the \$40,000 is identical to the cession to the Union.

Q. And the PML is what?

A. It is stated at 50%.

Q. What is the first one on?

A. It covers on the three and four story approved fire resistant building, occupied as a residence quarters, A. C. Barracks, Lowry Field, situate East 6th Avenue and Quebec Street, of the suburb to Denver, Colorado.

Q. Is there anything on that sheet with the exception of the estimated PML to indicate whether there is more than one risk involved?

A. No, sir.

(Testimony of J. M. Legris.)

Q. Now refer to the second sheet. What is the amount of insurance ceded there?

A. There are two amounts stated, one is \$40,000 and the other is \$24,444.

Q. On what sort of a risk, fire?

A. It is all on a fire risk.

Q. Both amounts?

A. No. Yes; this is provisional insurance, based no doubt on reports that are periodical, and the—before the \$40,000 is the letter M.

Q. Which would be mean maximum?

A. Yes, sir. And before the amount, \$24,444, is the letter A. The A, to tell you the truth, I don't recognize it. We generally put in the letter P for provisional. What does it mean?

Q. Average? [34]

A. Yes, sir; the same as provisional.

Q. Now, refer to the third sheet there. How much insurance is ceded to the Union by that?

A. \$100,000.

Q. And how much is the Union advised is the Northwestern's retention? A. \$100,000.

Q. And that is on what?

A. That is on all property contained on premises occupied for school purposes and situate in Salt Lake City, Utah.

Q. Now, refer back to No. 3. Counsel says I didn't ask you what that was on—sheet No. 2.

A. That covers maximum of \$810,000, or 30% of the total insurance on the following form, \$2,700,000 on stock contained on premises situate on

(Testimony of J. M. Legris.)

premises—on premises situate on premises on North 7th Street between North F Street and American River, and known as Main Plant premises, Sacramento, California.

Q. Is there anything on that sheet excepting the estimated PML to indicate whether or not there is more than one risk involved? A. Yes.

Q. What?

A. There is a statement below the description of the property which says \$100,000 at any one location", and immediately below that it says "Provisional insurance", which would indicate to the underwriter of this reinsurance that more risks might be involved than just the one risk at the one location. That is provisional insurance. That is well known to underwriters.

Q. (Mr. Cook): Refer to No. 3. Is there anything on that sheet [35] to indicate there is more than one risk involved, except the estimated PML?

A. Nothing.

The Court: You mean risk on property other than that covered by the known and expressly accepted risk?

Mr. Cook: No. A risk, as we use the word, is any one part of a property which is subject, in the judgment of the underwriter, to one loss.

Q. Is that not a fair statement of that, Mr. Legris? A. That is fair enough, yes, sir.

Q. In other words, one unit may be considered, in the judgment of the underwriter, as two risks, is that true? A. Yes, sir.

(Testimony of J. M. Legris.)

Q. Because of its construction and so forth?

A. Because of certain peculiar things around the building, like a separate wall or a fire wall, or there may be a division between the risks, like an alley, or something like that.

Q. That is right. I might state that ties into this case because this bridge was indicated as two risks, when the judgment of the underwriter said that the bridge, as such, constituted two insurable risks rather than one risk, that would be destroyed from one cause. Now, refer to sheet No. 4. Let me first ask you on No. 3, what is the estimated PML on No. 3? A. 11%.

Q. And you were ceded \$100,000 on that?

A. We were.

Q. All right; now No. 4 covers what—what is the PML on sheet No. 2? A. 30%.

Q. All right; now sheet No. 4 ceded you how much insurance? A. \$50,000. [36]

Q. And the estimated PML? A. 25%.

Q. And the property?

A. The Washington Toll Bridge Authority et al on the Lake Washington bridge, described further as the Lake Washington bridge and approaches connecting Seattle and Mercer Island in the State of Washington.

Q. Is there anything on that except the PML to indicate there is more than one risk involved?

A. There is not.

Q. I think I can cover the balance of those with one question, possibly. In examining that document

(Testimony of J. M. Legris.)

there is it not true that all of those dailies cede to you more than the \$25,000 limit of insurance, as provided in your reinsurance contract?

A. Yes, sir.

Q. And is it not also true that taking into consideration the PML the risk which you assumed in each instance is less than the \$25,000 limit?

A. That is not so.

Q. On which one is that not correct?

A. There is one certificate of reinsurance here showing \$40,000 to the Union on a net retention of the Northwestern at \$200,000, with one other insurance of \$50,000 under use and occupancy, on the California Toll Bridge Authority, et al, which is the bridge spanning San Francisco Bay between San Francisco and Oakland, California, and there is no PML stated on the certificate.

Q. There is no PML there?

A. That is right.

Q. Do you know whether there may have been some special corre- [37] spondence about that special risk or not?

A. I assume there no doubt was, but I don't recall.

Q. My question, however, is correct as to all the other dailies shown in that exhibit?

A. As to all the others it appears so, yes.

Q. Mr. Legris, is it not a fact that in the many years these two companies have been dealing together, the only method used of indicating whether

(Testimony of J. M. Legris.)

more than one risk was involved was by the use of this PML?

A. I would not say so. That is not my understanding of the PML.

Q. It is not? A. No.

Q. It is part of your duties in your position with the Union to handle these reports as they come in? A. Not presently, no.

Q. May I ask you if it is not a fact that there is no—it is understood there is no risk involved greater than the estimated PML?

A. In those sheets?

Q. In those sheets or in your other dealings with the company?

A. I believe that is so, yes.

Q. In other words, the method of the two companies doing business was on the basis that the estimated PML would not exceed the one risk limit contained in your policy—in your contract—I should say?

A. Will you please read that question?

(Last question read.)

I would not say that would be so.

Q. Did you not state that no one risk would exceed the PML percentage?

A. If I did I did not quite—I did not answer clearly your question. [38]

The Court: The preceding question?

A. Yes.

The Court: You may correct your answer.

(Testimony of J. M. Legris.)

Q. (Mr. Cook) Explain the situation. Possibly my questions are not clear.

A. I believe the questions that are being put to me now on the PML are not being put to me on the real meaning of PML. PML, in underwriting, means what the three letters stand for, the probable maximum loss in the risk involved, and that, of course, governs the underwriting. It gives the quality of the risk, and it enables the two companies—the ceding company and the accepting company—the reinsuring company—to determine whether or not the two companies are agreeable to take a smaller amount or a larger amount as a net retained line, in the case of the ceding company, and as a line of reinsurance in the case of the accepting company.

Q. May I interrupt? In other words, the PML determines the amount of insurance you will put on any one policy, is that right?

A. The PML determines the amount of the retention by the ceding company on any one risk, because the PML, by itself—by its express percentage—says the quality of the risk is a certain quality, and what in the judgment of the underwriter of the ceding company it is expected a loss may be under that particular risk.

Q. You stated yesterday that the net loss—or your loss—the Union's loss on this bridge—was reduced by an excess policy which you carried to \$15,000, did you not? A. That is right.

Q. Now that policy required, as you understand,

(Testimony of J. M. Legris.)

the specific [39] endorsement for each risk assumed under it? A. Yes, sir.

Q. In accepting reinsurance ceded to you by the Northwestern, where the net retention on one risk is less than \$30,000, do you consider or take into account at all the existence of this catastrophe reinsurance?

A. First, without any knowledge of any catastrophe coverage, the company's policy would be to accept on its face the net retention stated by the ceding company as its actual net retention, subject to a loss in that amount to the company as such.

With knowledge, however, as obtained after this Tacoma Narrows bridge loss, that the Northwestern has a catastrophe coverage with a first loss liability of \$30,000, plus a 10% addition up to a certain amount, our company would not accept, except upon special authority, the cession of the Northwestern on the basis of a net retention amount which would be greater than the known net retained line under the catastrophe coverage.

Q. Mr. Legris, you said yesterday the Northwestern was a much stronger company than the Union, financially, I mean? A. Yes, sir.

Q. Where did you receive that information?

A. From known financial reports. I see a book on the table there, Best's Fire Insurance Report.

Q. That is a recognized publication in the insurance world, is it not?

A. I believe so. It is referred to as a statistical report.

(Testimony of J. M. Legris.)

Q. A statistical report on all companies doing business in the United States? [40]

A. Practically so; reporting to that organization.

Q. How long have you known of the existence of that book? A. A good many years.

Q. How many years?

A. I would say over twenty.

Q. Over twenty years, and you have occasion to refer to it from time to time in your business?

A. Yes, sir.

Q. And it is in the office of practically all insurance companies in the United States?

A. I would say so.

Q. And it is in your office? A. Yes, sir.

Q. And has been for years? A. Yes, sir.

Q. And has been referred to by you and other officers of your company many times?

A. Yes, sir.

Q. Have you ever looked at the report of the Northwestern in that book?

A. I don't recall of having looked at that report for quite a while.

Q. For how long? A. Many years.

Q. Do you recall any other officer of your company ever looked at or referred to the report of the Northwestern contained in Best's Insurance Reporting, Fire & Marine?

A. I wouldn't know.

Q. Will you refer to page 991 of that book for

(Testimony of J. M. Legris.)

1940 and read to the court that paragraph (indicating)?

A. "The association has very satisfactory arrangements under [41] reinsurance treaties for reinsuring excess lines, besides it carries a first excess catastrophe coverage for \$200,000, applicable to all hazards in excess of \$30,000, and the second excess over \$250,000, up to \$500,000, with a group of American reinsurers and London Lloyds."

Q. Do you mean to tell the Court that none of the officers of your company knew the Northwestern carried this excess policy, Plaintiff's Exhibit "1" for identification?

A. For myself I would say I didn't know.

Q. You didn't know.

A. And I could not tell for the others.

Q. And the only reason you would not know is because you did not refer to this book or to the books which gave that information.

A. That would be the reason as long as you have shown me the reference.

Q. That is a matter which is subject to be common knowledge to anybody in the business, is it not?

A. What?

Q. The fact they carry this specific policy.

A. I would not necessarily say that is so. That particular book is a book of reference, and while it is true that it may be in our office I would not say that we necessarily read all the script matter that follows or that may apply to any particular

(Testimony of J. M. Legris.)

company, or even the figures applying to that particular company.

Q. There is nothing to prevent you from getting that information.

A. There would be nothing to prevent us from reading it.

Q. Do you mean to testify here that the Union Mutual did not know that the Northwestern carried this policy, Plaintiff's Exhibit "1"?

A. For myself—— [42]

Q. I am not talking about you. I am talking about the defendant in this case, to you, as an officer of it.

A. I would say so.

Q. That they didn't know a thing about it?

A. In the Home Office of our company the underwriting department of our company did not know about that.

Q. And they have done business with the Northwestern for how many years?

A. Within the knowledge of the facts I have, since 1928, anyway.

Q. And this book has been published and you have been familiar with it for over twenty years?

A. Yes.

Mr. Dumett: May I ask a question. This book covers 1940 or 1941. It was published in 1941.

The Witness: I was going to say that the book applies to annual statements of companies as of December 31, 1939, and this book, which is the 1940 issue, I would recognize this book to have been

(Testimony of J. M. Legris.)

issued by Best Publications in May, 1940, approximately at that time.

A. It is a book of reference for those who may want to refer to it for the period 1940, going into 1941, but upon information obtained as of December 31, 1939.

Q. (Mr. Cook) You say it was in the hands of the insurance trade in May, 1940?

A. I believe that is about the time it comes in.

Q. I started to ask you whether you had ever seen any certificate ceding reinsurance to your company, which disclosed the fact that the ceding company carried a catastrophe excess policy?

A. I don't recall seeing any.

Q. You never have? A. No, sir. [43]

Q. Referring again to this matter of public knowledge of the existence of this particular catastrophe policy, you were with an insurance department before you went with the insurance department of the State of Connecticut, I understand?

A. Rhode Island.

Q. Yes, Rhode Island; prior to the time you became associated with this defendant company?

A. Yes, sir.

Q. Is it not required the insurance companies file with the insurance department of certain states certain annual statements? A. Yes, sir.

Q. And those are public documents, are they not? A. Yes, sir.

Q. Open to the public for inspection?

A. Yes, sir.

Q. And do not those documents filed with the

(Testimony of J. M. Legris.)

Insurance Commissioner of each state disclose what catastrophe excess coverage the companies carry?

A. It is over twenty years since I have been with the State Department—twelve years, I beg pardon,—and the annual statement form which is used for the filing of annual reports contains so many items that to answer your question correctly I really would need to see the form.

Q. But your own company files its form?

A. Yes, sir.

Q. Are they not filed with you?

A. I haven't prepared the annual statement form in three years now.

Q. I asked you if they were not filed with you?

A. I am familiar with the annual statement forms, yes sir. [44]

Q. And those are forms required by law to be filed with the Insurance Department?

A. Yes, sir.

Q. And do not the annual statements which your company files disclose the existence of these excess policies which you carry?

A. I don't believe so.

Q. You don't believe so?

A. Not our statement.

Q. How about the reports made by the examiners when they examine insurance companies?

A. As a rule they report these contracts, but not always.

Q. Where are those reports kept after they are made?

(Testimony of J. M. Legris.)

A. Within the State Departments. Within the home department of the home company, of the company of the particular location.

Q. And those are matters of public record?

A. Yes, sir.

Q. And they will disclose the existence of these catastrophe policies?

A. If reported in the reports, yes sir.

Q. Do you know what the premium was on this policy that was paid to the Union by the Northwestern?

Q. (Mr. Cook) Mr. Legris, my last question was the amount of the premium paid by the plaintiff to the defendant on the policy in issue here.

A. \$600.00.

Q. And what was the rate per thousands of insurance? A. \$12.00 per thousand.

Q. That premium was paid to the defendant?

A. I would say so because accounts between—for reinsurance—are rendered on a monthly basis and they are payable within [45] sixty days after the accounts are rendered.

Mr. Dumett: The witness is answering to the best of his knowledge, but I am so certain it was paid I will admit it. I think that is satisfactory.

The Witness: That is very satisfactory.

Q. (Mr. Cook) Has any portion of that \$600.00 ever been returned to the plaintiff?

A. No, sir.

Q. Has it ever been tendered to the plaintiff?

(Testimony of J. M. Legris.)

A. The Northwestern shortly after the loss issued an endorsement cancelling the certificate of reinsurance because of the loss, and on that endorsement it stated—"no return premium."

Q. My question was—you say the premium has been paid, has any portion of the \$600.00 ever been tendered back to the Northwestern? A. No.

Q. That is all. There is one further question, if I may reopen, Your Honor, merely in reference to the excerpt which you read from the Best Reports, will you state whether or not that excerpt appears under the heading "Management and representation?" A. It does.

Mr. Cook: That is all. [46]

Mr. Dumett: On that point I would like to say before asking a few questions on redirect examination, that with respect to the premium that was paid the Union by the Northwestern on this reinsurance cession, I have admitted that that premium had been paid because I am certain it has.

We have tendered and actually paid to the Northwestern the amount which we admit is due from us to the Northwestern under the reinsurance contract. We have not been able to determine, however, to date and will not be able to determine until the court's final decision, what the final amount of the premium due us may be; therefore, we have not paid back to the Northwestern any portion of that premium to which it might equitably be entitled, if it should be ultimately held by the court the actual amount of retention was \$32,000 rather

(Testimony of J. M. Legris.)

than \$50,000, and therefore the Union is only liable on the basis of \$32,000.00.

We wish in all respects to be fair in the matter, and if it should be determined in accordance with our contention that the actual liability was on the basis of \$32,000 rather than \$50,000, we would then not only be willing but we would ask the Court to make such an allowance, to provide in this decree that such portion of the premium as might be deemed to be unearned should be returned to the Northwestern.

The basic reinsurance contract says in the event a larger amount is stated by Northwestern as its net retention than its actual retention, the only adjustment they should be able to get is to reduce the liability of the Union from the higher figure to the lower figure, and it says nothing about returning premium, and under [46a] the contract I don't think there is an obligation to return it, but in spite of that we offer to return such portion of the premium that may be unearned as determined by the Court, and we concede the Northwestern would be entitled to it despite the strict letter of the contract. [46b]

Redirect Examination

Q. (Mr. Dumett) Mr. Legris, if you will turn to Plaintiff's Exhibit "1" for a moment for reference, I believe Plaintiff's Exhibit "1" is the excess catastrophe reinsurance contract which the Northwestern had at the time of its cession of reinsurance to your company, is it not?

(Testimony of J. M. Legris.)

A. Yes, sir. This Exhibit "1", it is noted on the back as the Northwestern's catastrophe cover, first excess. [46c]

Q. That identifies the exhibit. Now, counsel asked you on cross examination whether that contract, Plaintiff's Exhibit "1", was identical with or the same as a retrocession contract, by virtue of which your company reinsured part of its risk, and I believe your answer was they were not identical? A. That is right.

Q. Are they similar at all?

A. Well, these contracts which cover catastrophe reinsurance, or excessive loss reinsurance, actually when you look at them they all look alike, and the only way you can actually determine how they are different is by comparing the provisions of the various contracts, and then you know what the contract covers.

One contract may differ in one thing or in one way, and another contract may not differ as to the same thing, depending on the demands of the respective companies.

Q. Having made that check as far as time allowed, what would you say as to the similarity or lack of similarity of Exhibit "1" with reinsurance contracts you had?

A. That covered our reinsurance under the cession of the Northwestern under the Tacoma Narrows bridge?

Q. That is right.

(Testimony of J. M. Legris.)

A. I would say offhand that the contracts are different.

Q. Now will you refer to what I think is clause No. 6 in that Plaintiff's Exhibit "1", and I think you will find that is the clause that refers to the liability under the policy, starting out "the amount of loss in excess of liability"? A. Yes, sir.

Q. Will you read it?

A. It is a long clause. I can read it if you want me to.

Q. I wanted the clause that refers to the retained net lines.

A. The clause reads as follows, in the first three lines: [47] "The amount of loss in excess of which liability attaches hereunder is understood and agreed to be the ultimate net loss of the reinsured company on its net retained lines only." And there is a semi-colon and the clause continues quite a number of lines following that.

Q. That is sufficient for my present purposes. Now the basis of the amount of loss then would be contained in that clause you have read, would it not? A. I would say so, yes.

Q. Under the provisions of that Plaintiff's Exhibit "1" which you just read, and from the information which you have regarding it, what would be the net retained line of the Northwestern on the Tacoma Narrows bridge that would be involved in the present suit?

Mr. Cook: I object to that. That is asking for

(Testimony of J. M. Legris.)

the conclusion of the witness, a conclusion which the court is to find. That is the ultimate fact.

Q. Having that clause in the contract before you, and having before you the reinsurance contract between the Northwestern and the Union, which has been introduced in evidence here, and having before you the telegrams and certificates under which the Northwestern actually ceded the insurance to you, could you, as an expert on insurance, compute the actual net retention of the Northwestern on that bridge, with respect to any loss occurring from any catastrophe?

A. I believe I could, yes.

Q. What would it be—how would you do it?

A. Under the Tacoma Narrows bridge reinsurance to the Union the Northwestern stated to the Union that its net retention was \$50,000. That \$50,000 is an amount in excess of the first loss of \$30,000 provided for in this catastrophe coverage I [48] have before me, Exhibit "1", and that being so from the \$50,000 you would first deduct the first loss of \$30,000, which would leave the amount of \$20,000. Then from the contract the reinsurance covers 90% of that excess of \$20,000, and leaves a liability to the Northwestern of 10%; 10% of \$20,000 is \$2,000, which added to the first loss of \$30,000 shows a net retained line, as I would understand it from this contract, to be \$32,000.

Q. Now will you turn to Plaintiff's Exhibit "2". Plaintiff's Exhibit "2", I believe, is the certificate from the Union to the Northwestern ceding

(Testimony of J. M. Legris.)

certain reinsurance which you referred to as some villages down in the southern states, is that right?

A. Yes, sir. It is a report of reinsurance placed by the Union with the Northwestern covering properties of the West Point Manufacturing Company in various locations in the State of Alabama.

Q. Referring to that exhibit, if you need to, what is the coverage stated in that certificate of reinsurance? Can you analyze it briefly.

A. Yes, sir. The principal coverage—there are two items, and I will just refer briefly to the first item, which is in the amount of \$4,256,200, the second item being rather immaterial, in the amount of \$3998.00.

The coverage under this form is upon all buildings of the assured, consisting principally of dwellings, garages, schools, grandstand, and in fact all of their other structures located in a number of villages that are stated under Item 1, and these villages all have extended against their respective means limits of liability applying to the various villages.

I beg pardon. They are not all villages. There are [49] five villages and two properties that are known one as West Point Utilization, and the other one West Point Power Company. The five villages are known as Fairfax, with a limit of liability of \$833,363.00; the second valuation is a village known as Langsdale, with a limit of liability of \$894,714.00—

Q. By the way, if I may interrupt you. I will

(Testimony of J. M. Legris.)

shorten it as much as possible. I don't think I will ask you for all the details on that, but generally speaking is there a figure showing the liability as to each village?

A. There is a gross figure showing the liability as to each of the five villages and also figures showing the liability as to each of the other two properties.

Q. That is sufficient for my present purposes—unless there is something else there that you want to add. A. No.

Q. What is that type of insurance represented by that certificate covering these buildings commonly known as?

A. It is commonly known as blanket insurance.

Q. Blanket insurance is briefly what?

A. Blanket insurance, as I stated yesterday when I was talking about this certificate, is an insurance of convenience to cover, under one insurance policy, one or more risks, and the benefit of blanket insurance is to preclude the issuing—either the issuing of so many policies as there may be risks involved in the blanket insurance, or to preclude the scheduling of all of the individual risks covered under the blanket insurance with individual amounts of insurance applying to each of such risks.

Q. In that type of policy such as the one before you, is there any scheduling of the individual risk showing the individual insurance companies covering that risk? [50]

(Testimony of J. M. Legris.)

A. The form I have before me does not show anything but blanket amounts applying to the five villages and to the two other properties.

Q. In the exhibit before you, Exhibit "2", there are a number of structures involved, separate structures?

A. Necessarily there would be. It covers under item I, which is the principal item referred to, all buildings and contents of the five villages mentioned, and the two other types of properties, so it just necessarily follows that there are many structures with seven groups of properties involved in the coverage.

Q. In a case like that where you have a blanket reinsurance coverage, is it the practice for the direct insurer to issue separate policies on many of those individuals risks involved in the blanket?

A. No. Separate policies are not issued when you have a blanket coverage, unless possibly by law the coverage being in different states would require a so-called underwriting policy in some one state named in the coverage.

Q. Now as to the PML, or probable maximum loss, which has been referred to several times in the cross examination, I will ask you to assume a building in the City of Seattle in the center of the city with high fire protection, and another identical building outside the city limits remote from fire protection, the buildings are identical, could you have a different probable maximum loss on those two buildings, though identical?

(Testimony of J. M. Legris.)

A. We certainly could.

Q. For what reason?

A. Because the one risk in the city of Seattle where no doubt there is fine fire protection, would not be exposed normally [51] to a great loss, and so the probable maximum loss on that building would be less in amount than on the other building located in a community or somewhere where no fire protection might be had.

In that case, in the second case, the building located outside of fire protection, in case of a loss it would necessarily—not necessarily—but would no doubt be exposed to a much larger loss than the first property, and so the probable maximum loss amounts under the two risks would certainly be different in underwriting practice.

Q. And would that be true even though we assume each of these buildings constitutes but a single individual risk?

A. They surely would constitute a single risk.

Q. Now counsel has interrogated you regarding this book of Mr. Best, Best's Insurance Reports. Are you familiar with the method of the getting of data for that book?

A. I am.

Q. What is the practice?

A. The general practice of the Best management is to send out to the companies each year a request for the information that is published. The companies—at least our company, sends out the information so far as the annual statement is concerned in two ways. We furnish Best management an exact copy

(Testimony of J. M. Legris.)

of the annual statement on file with the various states where we are licensed to do business, and in addition we complete for Best on a form submitted by them the figures wanted that are published in the financial statements at the top of the reference to any one particular company.

Then there is a lot of script, written date, given out to Best. I would say at least from the Union's experience that [52] it is the company itself which writes out the script and sends it on to Best, and the management of Best's very seldom, within my knowledge, finds fault with anything written, and they reproduce what the company sends out.

The Court: You mean by that that your company acts as a kind of an editor for the publisher of Best's?

A. Yes, sir. The article written, for example, on the Union in that book, is the article that has been written up by our own management.

The Court: What about the articles appearing concerning other insurers?

A. These other insurers no doubt do the same thing the Union does with respect to their own affairs.

The Court: Before your last answer I was applying your editing too broadly, as applying to other companies other than yours, but you do not mean to give that impression?

A. No, sir.

Q. (Mr. Dumett) What has been the practice as to your company when it is passing upon the

(Testimony of J. M. Legris.)

question of whether it will authorize a particular insurance? Does it consult Best's book on that point?

A. No, sir; not at all.

Q. What does it consult or refer to?

A. The reinsurance received is analyzed on the face of the information in the particular binder or certificate of reinsurance or daily reports—so-called—and if everything is correct on that certificate, in the judgment of the underwriting department of our company, why that is all there is to it.

That certificate is sent through the regular routine of statistics and accounting and then filed and forgotten, until [53] it is either taken out for a loss or for an endorsement or because it has expired.

Q. As to net retention?

A. As to net retention a check-up is made to see whether or not the net retention stated is——

Q. Stated by whom?

A. Stated by the ceding company—is within the automatic amount permitted under the reinsurance contract or as may have been approved by some primary authority.

Mr. Dumett: I believe that is all, counsel.

Recross Examination

By Mr. Cook:

Q. You say your company accepts reinsurance solely on the fact of the certificate that comes in and the information that it discloses?

(Testimony of J. M. Legris.)

A. On regular reinsurance, yes, sir.

Q. Would you accept reinsurance from a brand new company you had never heard of before without making some investigation of it?

A. No; because a brand new company would not cede reinsurance to us, except upon a primary reinsurance contract having been presented for the acceptance of such reinsurance.

Q. And when a reinsurance contract is negotiated with another company, a very thorough investigation of that company is made, is it not?

A. I would say yes.

Q. And not only as to its financial condition and financial stability but as to its excess coverage?

A. No.

Q. You don't pay any attention to that?

A. No, sir. I have prepared personally since 1930 a great [54] number of reinsurance contracts in our office, and I actually do not recall a single time where in the preparation of a reinsurance contract I referred to any book giving information on that particular company.

Q. That was not my question. Apparently you misunderstood me. I said your investigation also embraced the existence of excess coverage, would it not? A. It would not.

Q. Would that be for the reason you are not interested in what excess coverage a company ceding insurance to you may carry?

A. It is really because of the confidence we have in the company we propose to do business with.

(Testimony of J. M. Legris.)

Q. Where do you secure the information upon which that confidence is based?

A. The information is most generally, and I would say practically generally, based on personal visitations of some officer of the company to the company it is going to have a reinsurance contract with, or that other company visits our own office, and things are talked about and the matter of how much business shall be produced by such contact work is analyzed thoroughly, and at that time the question of the financial stability of the company is looked into.

Q. Isn't one of the most important features of the financial stability of an insurance company the type of catastrophe or excess protection it carries?

A. It is one of the very important factors, yes.

Q. And that is one of the factors which you investigate when you negotiate a reinsurance contract, is it not?

A. We do not.

Q. You do not?

A. We do not investigate the matter of catastrophe reinsurance [55] at any time another company may have.

Q. Although you say it is the one of the most important factors affecting the financial stability of the company?

A. Yes, sir. But it affects the stability of that particular company. As a reinsurer we only deal with individual items of reinsurance, and it is those items we protect ourselves against. We are not protecting the other company.

(Testimony of J. M. Legris.)

Q. Well, is that same thing true with companies to which you cede reinsurance?

A. I don't know. I couldn't answer for the other companies, what they do.

Q. I am speaking of what you do with companies to whom you cede reinsurance.

A. The principal thing we do with those companies is to check up on their financial stability.

Q. Well, in the companies to whom you cede reinsurance, when you investigate their financial responsibility do you mean to say you pay no attention to catastrophe or excess coverage they may carry?

A. In all the years I have prepared reinsurance contracts that is one thing I have never checked up.

Q. Although you say it is a very important part of their financial stability?

A. Yes, sir. And I will repeat it.

Q. Do you know whether any other officer of your company did—you have limited your answers to yourself as an individual, and I am now speaking of you as a company and not as an individual—does your company make such an investigation?

A. I would say no. Because in the—may I qualify?

Mr. Dumett: You may if you wish.

A. And I know that would be "no" because in the last few years [56] when we have entered into new reinsurance contracts it has been my privilege, being the one entrusted with the writing of the contracts, to sit in on the conferences where all

(Testimony of J. M. Legris.)

the officers interested would talk over the situation, and I don't recall in any of those conferences any one talking particularly about catastrophe coverages that the company we were going to deal with might have had.

Q. Is the reason for that because you are not interested in what catastrophe coverage they carry?

A. The answer possibly is this, that we do know from our own experience that catastrophe coverages have their value, and we have confidence when we find the financial stability of a company is of the type we want, that that company is financially strong, because it has safeguarded itself with the usual safeguards of catastrophe coverage.

Q. In other words, even without investigation you know that these strong companies do carry covers of that kind? A. Right.

Q. Do you not? A. Yes.

Q. And you knew the Northwestern carried one?

A. I would say the Northwestern being a financially strong company, in which we have confidence, would normally, like we were doing, carry catastrophe insurance.

Q. And you know they have carried it for the thirteen or fourteen years you have been doing business with them?

A. I would assume we knew it, because it is a common practice.

Q. You told counsel you could compute net retention of the Northwestern purely on the basis of the telegrams and the daily reports and that catas-

(Testimony of J. M. Legris.)

trophe contract, plaintiff's Exhibit "1"; is that right? [57]

A. And other information.

Q. What other information would you use in computing it?

A. There was a letter—I cannot recall which exhibit it was—that was referred to me yesterday, in which the basis of the catastrophe coverage was stated, that it was a first loss of \$30,000—

Q. That appears in the contract itself, Plaintiff's Exhibit "1"? A. Yes, sir.

Q. That appears in there? A. Yes, sir.

Q. And from those documents you can figure that in July, 1940, when this insurance was ceded to you, that the retention of the Northwestern was only \$32,000? A. I would say yes.

Q. Now, Mr. Legris, I want you to assume that instead of the loss which did occur on that bridge there were five separate losses, amounting to \$10,000 each, how much would the Northwestern have been called upon to pay itself under that policy?

Q. Do you understand the question?

A. No.

Q. Assuming there were five separate losses from five different causes of \$10,000 each, so far as the retention of the Northwestern is concerned what would *be* the Northwestern have been called upon to pay?

Mr. Dumett: Do you mean five losses at different times?

Mr. Cook: Different times from different causes during which the policy is in effect.

(Testimony of J. M. Legris.)

A. You are talking, of course, of several risks.

Q. I am talking of the Tacoma Narrows bridge having five different separate losses at five different times from five separate causes, during the time this policy is in effect. [58] How much would they have to pay?

Mr. Dumett: The Northwestern?

Mr. Cook: The Northwestern alone.

A. The Northwestern alone, under the five losses, being separate losses, would have to pay each time the amount of \$10,000.

Q. In other words, they would pay \$50,000?

A. Right.

Q. On a net retention of \$32,000 worth of coverage?

A. Yes, sir.

Q. You say "yes". How could they pay more than their retained coverage?

A. If their retained coverage applied on a single loss—a retained coverage means every time there is a loss the retained coverage acts. If you have a—take the Tacoma Narrows bridge policy, which has been stated at a net retention of \$50,000—we will assume it is \$50,000. There is this excess coverage which states that on any one loss the liability of the Northwestern on that risk shall be \$30,000 plus the 10%, but it is under any one loss, and if more losses occur—if more losses occur, the same reasoning applies to each loss, and that is common insurance practice.

The Court: For instance, would it be the same with ordinary automobile liability, and would not

(Testimony of J. M. Legris.)

the same principal apply there if you had a \$10,000 limit covering one automobile against liability in a single accident, if on one occasion you had a \$5,000 loss and the insurer was called upon to cover that, and then if a month later you had a \$6,000 loss, would that \$6,000 loss be protected to the full limit of the policy, notwithstanding the payment under the first loss?

A. Provided the first loss of \$5,000 were reinstated [59] upon the loss to bring the policy back to its face value again, and that is done regularly in insurance.

Q. (Mr. Cook) Do you not come right back to the point under your theory that you cannot determine the net retention until after the loss has occurred?

A. No, I don't agree with that. You can always determine it when you have the amount——

Q. You can determine it this way you mean——

Mr. Dumett: I don't think he finished the answer. Had you? A. No.

Mr. Cook: All right; go ahead.

A. Upon an individual risk, as in the case of the Tacoma Narrows bridge, under which the Northwestern stated it retained \$50,000 on that one risk, the Northwestern knew at the very beginning of the insurance that it was subject on that one risk upon the happening of only one loss, to no more than a first loss of \$30,000 plus 10% of the excess over \$30,000 up to \$50,000, or \$2,000, making an aggregate of \$32,000, and that is all the Northwes-

(Testimony of J. M. Legris.)

tern was exposed to upon a total loss, the amount of \$32,000, and it knew it at the time of issuing the policy upon that one risk.

Q. You interjected the words in the answer "Assuming it was a total loss"?

A. That is the way you figure net retention. You always figure net retention on the basis of a total loss.

Q. But if you have five separate losses you pay \$18,000 more than you retain?

A. You would not in the case—although they would pay \$10,000 in the case you stated, I assumed, as I told the Court here, there would be between the losses the reinstatement of the [60] amount of insurance, which is the normal practice with all insurance companies.

Q. If the \$50,000 they retained is only the \$50,000 they pay out there would be no reinstatement?

A. Oh, yes. When there is a loss you file a new policy automatically, under the insurance policy, in the amount of insurance reduced by the amount of the loss.

Q. Would it be a reduction of \$10,000 at a time until the full \$50,000 were paid?

A. Yes, sir.

Q. On the first retention of \$32,000?

A. Yes, sir.

Mr. Cook: That is all.

Mr. Dumett: That is all. That is the defendant's case.

The Court: Defendant rests.

PLAINTIFF'S CASE

KARL P. BLAISE,

called as a Witness by the plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Cook:

Q. You may state your name, please.

A. Carl P. Blaise.

Q. Where do you reside?

A. At Cedar Rapids, Iowa.

Q. You have resided there how long?

A. Since January, 1929.

Q. In what business are you engaged?

A. Fire insurance business.

Q. Associated with what company? [61]

A. The Inter-Ocean Reinsurance Company.

Q. Prior to your becoming connected with that company what work did you follow?

A. I began the insurance business in 1914 with the State Department of the State of Iowa, and served there as general clerk, fee clerk, chief clerk, examiner and chief examiner, and served from 1914 until 1925, with the exception of a year in the service over seas, and I was then associated as general auditor with a fire insurance company and a casualty and surety company, from 1925 to 1929, when I joined the Inter-Ocean Reinsurance Company, in the capacity of assistant secretary.

(Testimony of Karl P. Blaise.)

In 1932 I was made vice president and secretary and have continued in that capacity up to the present time.

Q. What is the nature of your work with the Inter-Ocean reinsurance Company?

A. In addition to the usual executive duties it consists largely in the contact and negotiation and issuance of reinsurance treaties.

Q. With other companies?

A. With other companies.

Q. Do I understand the business of your company is limited entirely to reinsurance?

A. That is correct.

Q. You don't write any primary coverage yourself?

A. No, sir.

Q. How many companies at the present time does your company write reinsurance for?

A. We carry at the present time eighty-eight catastrophe contracts, covering fifty-five companies, catastrophe contracts covering different special hazards. Those are contracts originated by our own company. We likewise participate in [62] eighty-three contracts by way of reinsurance on contracts originated by other companies. We also carry eighty-six contracts of pro rata reinsurance covering fifty-five companies.

Q. Now that we may be clear on that, when you speak of pro rata reinsurance you speak of the kind involved here in this case, where the Northwestern ceded \$50,000 to the Union?

A. That is correct.

(Testimony of Karl P. Blaise.)

Q. That is known as reinsurance?

A. That is correct.

Q. And the other contracts which you mentioned are catastrophe excess contracts?

A. That is correct.

Q. Will you state to the court what, in insurance language, is meant by the term "net retention", or, as in this contract, an amount retained net without reinsurance at its own risk and liability on one specific property?

Mr. Dumett: We wish to interpose an objection to that question, that is directed to the same point, on the grounds previously stated, but which I will restate. This query asks the witness what is meant by a clause, which we submit is written in plain, ordinary English in the contract, and is not subject to interpretation or construction by either the opinion of experts or by custom or usage, and we object to the line of inquiry on the ground it is irrelevant, immaterial and incompetent, beyond any issue in the case, beyond any pleading in the case, because the suit is on the contract. [63]

The Court: In saying "net without reinsurance" it explains itself, does it not, Mr. Cook? What do you suppose those words "without reinsurance by the reinsured company at its own risk and liability", what do you suppose they were put in there for if it was not to explain "retained net"?

Mr. Cook: That is what they do explain.

The Court: But you say some explanation or interpretation is to be put upon those words "retained

(Testimony of Karl P. Blaise.)

net" other than as appearing from the words themselves?

Mr. Cook: That appears to me very clear, but the contention in this case is, and the testimony so far is that one man says certain things have to be considered in determining retained net, and our theory is it has no place in there at all. [63a]

Mr. Cook: I can only say this, I am not infallible, but I am content to rely on the pleading, but however I have no hesitancy in making an application, and I do now ask leave to amend to include that in the application. [63b]

The Court: It would be informative to the court if you made a specific proposal of amendment. What is your amendment and what do you propose to amend? So there will be something definite before the court.

Mr. Cook: Since there is no provision for a reply I suppose it would have to be an amendment to the amended complaint by alleging as Paragraph 10 of said Complaint that under the usages and customs of the insurance business and in the insurance world the term "net retention" or the term "amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company", does not include and has no application to any catastrophe excess insurance, and that such catastrophe excess insurance is not considered in arriving at such net retention.

(Testimony of Karl P. Blaise.)

Mr. Dumett: Without any desire to be technical with my good friend Mr. Cook, I do feel I should object to that application.

I think that is in the nature of a pleading that should have been made in the first place if he was intending to rely on any such proof; and we are contending it should have been in the Complaint and not in a Reply; and if it has any place in the case at all it is a part of their cause of action; and I do feel the proposed amendment comes too late.

The Court: Mr. Dumett, do you claim that the wording of the requested amendment is not sufficient to make material this question to which you have now an objection?

Mr. Dumett: Yes, Your Honor, I do. I claim the amendment besides being untimely does not make material this line of inquiry.

I have two objections. First, the inquiry is not within the issue stated in the Complaint, but my second point is that even though the complaint had the express allegation in [64] it to that effect, the testimony is inadmissible in view of the fact the Court has before it by admissions of the parties the written contract, which on the face of it does not permit of any such construction or amendment.

The Court: Well, gentlemen, I haven't the slightest hesitancy in stating if I ever saw a contract that seemed technical and unfamiliar in its terms to me as a trial judge this is one, and it is more so than any I ever saw.

In such consideration as I have so far given to the

(Testimony of Karl P. Blaise.)

terms and provisions of this contract they seem about as unfamiliar to me as any I ever read, and I am inclined to think laymen, those other than insurance people, people engaged in the insurance business, would find it, as they do generally as to insurance contracts, more or less mysterious.

I am not taking this question in its view most favorable to the objecting party. I am not prepared to certainly say that this phrase which the plaintiff seeks to allege has a special trade meaning or has a special interpretation put upon it by the usage of the trade, or is not a technical phrase peculiar to that insurance business, and not being prepared to say certainly that it has no such technical trade meaning, it seems to me it would be error for the court to hold that the party is without right to put that question in issue and in a proper manner offer proof relating to it, and in order to make certain that he has that right, which he asserts, it seems to me from his standpoint it is much safer to have the amendment expressly putting it in issue, and he has requested that amendment at this time and that request, in my opinion, should be granted, unless there is material prejudice resulting to the opposite party by reason of the time the request was made. [65]

I do not think it is late to be made—to be attempted to be made—at this time and not before. Some suggestion was made by someone—I got the impression that someone made the suggestion that if the court ruled against the plaintiff on this ques-

(Testimony of Karl P. Blaise.)

tion and the question allied with it that finally the plaintiff would ask a trial amendment of the pleadings. That was at the commencement of the trial.

But notwithstanding that this court is engaged in trying to find out what the truth is on these issues, and these parties litigant are interested first and last and all the time in ascertaining the truth applicable to these issues raised here, and which ought reasonably to be raised here, in order to fully and finally dispose of this litigation.

And so considering those circumstances and all of them, the court feels that this trial amendment to the pleadings requested should be granted, but that a reasonable time, even after the completion of the taking of the testimony that is now arranged to be taken and contemplated, and this trial should be held open for a reasonable length of time to give the defendant an opportunity to bring forth any evidence on that issue he thinks should be brought forth. I think the court should reserve that right to the defendant.

The Court: This trial amendment requested by the plaintiff is now granted, provided, however, that upon the completion of the taking of the testimony that is now available at this trial, which counsel had until now contemplated would be all the testimony that would be taken, the Court will continue this case for further trial and the taking of further testimony, for the purpose of allowing the defendant an opportunity of presenting such testimony on this issue [66] tendered by this amendment, as

(Testimony of Karl P. Blaise.)

the defendant may reasonably wish to offer, and that continuance shall be to the 1st day of March, 1943, and on that date I wish counsel—if it is not done before—to appear in court and be ready to proceed to trial on the further trial of this case.

The objection to the question will be overruled in view of the allowance of this amendment and in view of this amendment, and the witness may now answer the question, which I think has not been answered.

Before you read the question I would like to accept the offer of counsel to provide me at the parties' joint expense a transcript of this testimony, and you may do that at any time if that is convenient. You need not wait until March 1st, but you may do so at any time that is convenient. [66a]

Mr. Dumett: It is my understanding now that it is not necessary to take exceptions, Your Honor.

The Court: If this case is covered by the new rules you do not need to take exceptions. What do you think about it, Mr. Cook?

Mr. Cook: It is not necessary in my mind.

The Court: Very well, that will be the understanding. You may read the last question.

(The reporter then read the last question.)

The Court will overrule that objection. The Court does now, if it has not already, overrule the objection in view of the amendment, and an exception is allowed.

You may now answer the question, Mr. Witness.

(Testimony of Karl P. Blaise.)

A. The net retention is that amount of liability on a given risk remaining to the account of the primary company after the deduction of all specific reinsurance from the gross line relating to that particular risk.

The Court: You might explain that language. I suppose you mean the principal insurer, do you not? It may be my supposition is entirely wrong, and that illustrates you should explain a term like that.

A. The gross line, assuming a company had written a gross line [67] for \$100,000, the policy was for \$100,000, but it was their desire to retain only \$25,000 on that risk, they would reduce the gross line of \$100,000 by specific reinsurance, specific cessions to other companies, until the gross line had been reduced to \$25,000.

Q. And tying that in with the policy in force here, the gross line was \$350,000 on the bridge?

A. Yes, sir.

Q. And that was reduced by specific reinsurance to \$50,000? A. Yes, sir.

Q. And then would the \$50,000 be the net retention of the Northwestern Mutual Fire Association under that policy?

Mr. Dumett: May it be understood, to avoid reptitious objections, that the objections previously stated to this line of questions may be understood as running to all this testimony?

Mr. Cook: That is agreeable to me.

(Testimony of Karl P. Blaise.)

The Court: That is approved by the court with this condition, that if at any time it occurs to you there is any added reason or basis for your objection to whatever happens you will thereupon advise the court of that.

Mr. Dumett: I will, Your Honor.

(Last question read.)

A. Yes, sir.

Q. What have you to say as to using a catastrophe policy in any way in computing the net retention of a reinsured company?

A. A future catastrophe policy does not specifically make any cession on any specific risk. It is merely for the protection of the net retained lines of the primary company, nationwide, wherever they may be located.

Q. Will you explain as briefly and as clearly as you can, in [68] non-technical language, if you can, the difference between specific reinsurance and catastrophe excess insurance?

A. Specific reinsurance is used solely for the reduction of the liability on an individual risk.

Catastrophe reinsurance is for the purpose of protecting all of the net retained lines—that is, after the individual risks have been reduced down to the desired amount by the primary company, it still is confronted with the possibility of a catastrophe loss, either by conflagration, wind storm, flood, earthquake, or any of the catastrophic hazards, for which the primary company will obtain, for its own pro-

(Testimony of Karl P. Blaise.)

tection, a catastrophe cover, which covers nationwide throughout the territory that it operates on all of the lines it retains net, so that no accumulation of small losses resulting from wind storm or conflagration can cause it any substantial loss. Practically all companies carry that protection.

Q. Is catastrophe excess insurance written on specific losses or not?

A. No. They are general covers, applying to all net retained lines, but not applying to any specific risk.

Q. Are you familiar with the policy, plaintiff's Exhibit "1", which was in force on the Northwestern at the time this loss occurred?

A. Yes, sir. I have looked at it.

Q. Assuming that one cause, or one catastrophe, one wind storm, for instance, caused damage all the way from Tacoma to Seattle, we will say, would this policy, Plaintiff's Exhibit "1", come into play then on all risks of the Northwestern in that territory?

A. Yes, sir.

Q. Regardless of the size of the policy or anything else? [69]

A. That is correct.

Q. Supposing the day afterwards another wind-storm came into effect, or happened, which did only \$10,000 worth of damage to one risk of the Northwestern, would this policy come into effect?

A. No, sir.

Q. Will you explain why, on that?

A. Because in the first storm there are involved

(Testimony of Karl P. Blaise.)

risks numerically—a sufficient number of them—to exceed the Northwestern's retention, and consequently the purpose of the policy comes in full force and effect then, for any loss in excess of the \$30,000 of retention prescribed.

In the other case the loss on the individual risk was only \$10,000, and therefore not in excess of the \$30,000 retention, and there would be no recovery under the catastrophe policy.

Q. I was trying to make clear this point that one event or one storm, one catastrophe is the thing insured against in that policy, is that not correct?

A. That is correct, sir.

Q. Regardless of where the damage may be done by that single event? A. That is right.

Q. Why is not insurance of this type considered in determining the net retention of a reinsuring company? A. You mean on a specific risk?

Q. Yes.

A. For the reason that this catastrophe policy is general protection, applying to all risks nationwide or within the territory within which the company operates.

In view of the fact it does not designate any specific risk of any kind at all, as a cession of the primary company, [70] it cannot operate to reduce the liability on any given risk.

Q. Could you give us any illustration to show why you could not use this policy in figuring a net retention?

(Testimony of Karl P. Blaise.)

A. Well, as I stated previously, the net retention is arrived at by specific cessions from the gross line. This policy here makes no specific reinsurance.

Q. That no doubt is clear to insurance men, but I wonder if you could not give us a homely illustration, taking the policy in force in this case, or in issue in this case, affecting the Tacoma-Narrows bridge, and illustrate in some way why it would be impossible to take that into consideration, in arriving at the net retention?

A. Well, in the case of the Tacoma Narrows bridge the gross line of the Northwestern was \$350,000.

In each and every reinsurance placed upon that bridge by the Northwestern that particular risk was ceded by the Northwestern to some other company until the retention of the Northwestern had reached \$50,000.

This policy could not be taken into consideration on the individual risk of the Tacoma Narrows bridge for the reason that no specific cession is made under this policy. Therefore, it could not reduce the retention of the Northwestern.

Q. Well, referring more specifically to the testimony heard this morning, whereby it appeared it could be figured to reduce the net retention to \$32,000, by taking the face of that policy, plus 10% of the additional \$20,000, what have *you say* as to that?

A. As to the individual risk on the Tacoma Nar-

(Testimony of Karl P. Blaise.)

rows bridge there has been no reduction in the net retention of the Northwestern through this general catastrophe policy.

I might add to that that the Northwestern in filing its [71] annual statement will show the full risk and the full premium on \$50,000 in force in its annual statement. There will be no diminution of the amount of the risk of premium because of the issuance of this policy.

Mr. Dumett: I object to the latter part of that statement as not being responsive, and being something beyond the line of questioning that is now being gone into. What may happen in the future does not have any bearing on the witness' opinion that he is expressing as to what this contract means.

The Court: Any response?

Mr. Cook: I didn't hear the statement.

Mr. Dumett: I said that the witness answered that the Northwestern would show this and so and so, and that is not responsive.

The Court: That part of the answer will be stricken, and the court will disregard it. [71a]

Q. Mr. Blaise, is there any way of telling prior to a loss whether this policy will be affected on any particular risk? A. No, sir.

Q. Is that to be considered at all then in determining what the net retention is? A. No, sir.

Q. Why can you not prior to a loss determine what effect this policy will have upon the liability of the Northwestern?

A. Well, the loss may or may not happen, and

(Testimony of Karl P. Blaise.)

it cannot be determined until after the loss has determined as to what effect this policy may have on the particular risk.

Q. Assuming that in addition to the bridge policy the Northwestern had insured two or three houses around close to the bridge which had been blown down, would that fact have further affected the amount payable under that policy?

A. Yes, sir.

Q. And by the same token a loss any place else from the same wind? A. Yes, sir.

Q. Do reinsuring companies report the existence of catastrophe contracts to their reinsuring?

A. Do reinsuring companies——

Q. Do reinsured companies, I should have said, report the existence of catastrophe contracts held by them, to their reinsuring companies, when they cede them a certain specific risk?

A. Not always. It depends on whether or not the reinsuring company makes specific inquiry or the ceding company makes specific inquiry, or whether or not the information is available elsewhere. [72]

Q. How universal is it in the insurance world for companies to carry catastrophe reinsurance?

A. Practically every fire and windstorm insurance company carries catastrophe reinsurance.

Q. Is that a matter of common knowledge in the trade? A. Yes, sir.

Q. Is such information available to anyone who may wish to inquire about it? A. Yes, sir.

(Testimony of Karl P. Blaise.)

Q. Where is that information available?

A. It is available in the year books, some of which are issued by the Spectator Company and some by the Alfred M. Best Company, and in Schedule "T" in the Convention Form of blank.

Q. Handing you Plaintiff's Exhibit "3" for identification, do you know what those forms are, what they are used for?

A. They are reinsurance daily reports.

Q. That is from the reinsured company to the reinsuring company? A. Yes.

Q. Is that the nature of the reports that come in to your company?

A. Yes. We have received some business on these daily reports and other business comes in on what is known as a reinsurance bodereaux.

The Court: Will you explain that term?

A. The difference between a reinsurance bodereaux and a reinsurance daily report—a daily report is issued for each separate risk ceded. The bodereaux is a long sheet of paper with a columnar distribution and a great many risks are listed on the bodereaux, with the information on each risk set out in complete detail.

In other words, it is a sheet which may take the place of twenty daily reports,—twenty will be on one sheet, instead [73] of having an individual sheet for each one. It is a short cut for the daily report system.

Q. In your experience either on bodereaux or these daily reports, have you ever seen any reference

(Testimony of Karl P. Blaise.)

made by the reinsured company to the existence of catastrophe excess insurance? A. No, sir.

Q. And why does it not appear on those reports?

A. Because it has nothing to do with the reduction of the liability on any given individual risk.

Q. How many of those reports do you suppose you have seen in your experience?

A. Well, a great many. It would probably run into tens of thousands.

Q. Is it the practice in the insurance business to advise your reinsuring company specifically on the daily report of the existence of a catastrophe excess policy? A. No, sir.

Mr. Dumett: The same objection. I make it again because this is a slightly different form of question, but under the same category of examination as to practice.

The Court: The same ruling; the objection is overruled.

Mr. Cook: I think you may cross examine.

Cross Examination

By Mr. Dumett:

Q. Mr. Blaise, what is the major purpose of having any provision at all as to net retention in reinsurance contracts?

A. The stated net retention is for the purpose of advising the reinsuring company the amount of liability retained by the primary company.

Q. Most reinsurance treaties require, do they not, some retention, some net retention, by the reinsuring company? [74]

(Testimony of Karl P. Blaise.)

A. As a general rule that is correct, yes sir.

Q. What is the importance of the statement of that net retention to the reinsuring company? Why is the reinsurer interested at all in a stated net retention by the reinsured company?

A. It gives the assuming company some idea of the underwriting of the direct writing company as to what they desire to retain net for their own account and gives rather an appraisal of the desirability of the risk.

Q. And do not most of those reinsurance treaties also provide that that stated net retention shall be continued during the life of the insurance?

A. Well, it did at one time, but in general practice that has been somewhat dropped in recent years.

Q. You mean to say in recent years even in a treaty which requires a specific net retention that the reinsurer permits the reinsured after the cession to drop the net retention entirely?

A. Not entirely but reduction is permissible.

Q. Is it not also the purpose of the net retention requirement to assure the reinsurer that the reinsured, by maintaining a substantial interest in the insurance, will use due care and diligence in placing the insurance?

A. That is correct, yes sir.

Q. And it is also some assurance that the reinsured company will use due care and diligence in investigating and adjusting losses?

A. That is correct, yes sir.

Q. Now in the case of the Tacoma Narrows

(Testimony of Karl P. Blaise.)

bridge, assuming what we know to be true, assuming that the Northwestern ceded \$50,000 of reinsurance to the Union, and stated it would retain \$50,000 net of that same insurance, and assuming further that at the time of the cession the Northwestern had this exhibit "1", [75] this excess catastrophe policy, and assuming that policy said in effect that in the event of any loss sustained by the Northwestern in excess of \$30,000, arising from one catastrophe, it would be protected on the excess to the extent of 90%—assuming that substantially—assuming those facts, isn't this true, viewing the situation as of the date the Northwestern made the cession, that the highest possible loss which the Northwestern could sustain, by reason of its insurance on that bridge, at its own risk and liability, and as a result of one catastrophe, was \$32,000?

A. I think that would be substantially correct.

Q. On that assumption I am asking you to make there is no conceivable set of circumstances that could have increased their liability on their own risk above \$32,000 for loss from one catastrophe on the bridge is there? A. No, I think not.

Q. Referring to Plaintiff's Exhibit "1", which is this excess catastrophe policy, Paragraph 6—I will hand it to you in a moment—Paragraph 6 on the second sheet inside of the folder, states: "The amount of loss in excess of which liability attaches hereunder is understood and agreed to be the ultimate net loss of the reinsured company on its net

(Testimony of Karl P. Blaise.)

retained lines only”—calling your attention particularly to the words “ultimate net loss of the reinsured company on its net retained lines only.” You may check it but you probably remember it (handing exhibit “1” to witness). What is your interpretation of that clause as to what it means, relating to net retention?

A. The ultimate net loss of the reinsured company on its net retained lines only would mean the loss sustained on the lines retained, after the deduction of specific reinsurance applying to all risks involved in the catastrophe, and the ultimate net [76] loss would be the gross loss less the recovery on all specific reinsurance placed on the properties involved.

Q. In the case of the Tacoma Narrows bridge the Northwestern insurance on that, related to the figures, what would that be—assuming a total loss?

A. I am not familiar with the maximum limit of this. That would simply be—will you ask the question again, please?

Q. The net loss referred to there in the language which I have read—

A. Yes.

Q. Is that the same thing or in any way different from the definition of net retention which you have heretofore given us?

A. There is a difference between net loss and net retention, yes.

Q. And how does that differ from the definition you have given of net retention?

A. In this case the loss applied to a specific risk,

(Testimony of Karl P. Blaise.)

or two risks, depending on the underwriting department of the Northwestern, whether they considered it one risk or two risks.

Q. And assuming one risk?

A. Assuming one risk there would have been no loss.

Q. Assuming two risks?

A. Assuming two risks there would have been a loss.

Q. And assuming a total loss regardless of the risks.

A. The Northwestern would have paid the first \$30,000 and 10% of the balance up to \$50,000.

Q. Or \$32,000? A. Correct.

Mr. Dumett: I believe that is all.

Redirect Examination

By Mr. Cook: [77]

Q. You say there is a distinction between net loss and net retention?

A. Yes; they are entirely different.

Q. What is the difference between the terms "net loss" and "net retention"?

A. Well, the net retention of the company if the amount it retains under any given policy for its own account. The net loss may only be partial and be less than the net retention.

Q. Does this contract, exhibit "1", have any bearing upon what the ultimate net loss of the company may be?

A. As a catastrophe contract, yes, it would have a bearing on the ultimate loss.

(Testimony of Karl P. Blaise.)

Q. It can affect the ultimate net loss?

A. Yes, sir.

Q. Does it have any effect on what is the net retention? A. No, sir.

Q. Counsel's hypothetical questions to you—you recall a couple of them—were based upon the happening of one catastrophe? A. Yes, sir.

Q. On that bridge, and I understood you to say their maximum loss from one catastrophe would be \$32,000, under that policy?

A. Under this policy, yes sir.

Q. Might it not be even less than \$32,000?

A. You mean the loss?

Q. The net loss to the Northwestern, because of the existence of that policy?

A. Well, if there was a partial loss it would be less.

Q. No, assuming that the Northwestern had other buildings insured which were also destroyed by the same catastrophe, would that not also affect the ultimate net loss on that bridge? [78]

A. Well, it might through an apportionment of the loss spread to all individual risks involved.

Q. Let us assume that the Northwestern had a building sitting right next to the bridge insured for an additional \$50,000, and both the bridge and the house were destroyed, what would be the total payment by the Northwestern for both the bridge and the house?

Mr. Dumett: I think that is improper redirect

(Testimony of Karl P. Blaise.)

examination, and I object to it on that ground. He went into it fully on the direct examination.

The Court: Is there any response to that suggestion?

Mr. Cook: This is certainly redirect examination on this specific question counsel brought out. I don't recall going into it in direct examination. I do think it is a little argumentative, as a lot of this testimony has been, but I think in the nature of the case it has to be argumentative.

The Court: He may answer this question, but try to be as brief as to any other similar questions. Read the question.

(Last question read.)

A. The total gross payment for the Northwestern would be \$100,000, subject to catastrophe cover.

Q. How much would it cost the Northwestern?

A. It would cost them \$30,000 plus 10% of seventy thousand dollars.

Q. Or \$37,000? A. Yes, sir.

Q. Only for the full \$100,000 of insurance?

A. That is correct.

Q. What could be the maximum cost to the Northwestern for damage to the bridge under the policy in question from two catastrophies rather than one?

A. I don't know whether this has a reinstatement provision or not. [79]. I assume that it does. The Northwestern in that instance on the bridge on two

(Testimony of Karl P. Blaise.)

catastrophies could recover the two same identical amounts, \$32,000 in each case.

Q. Assuming that the damage to the bridge was only \$29,000 there would be no recovery under that policy, would there? A. No, sir.

Q. And assuming that six months later a second accident had caused damage to the bridge to the amount of \$21,000, would there be any recovery under that policy? A. No, sir.

JOHN F. SULLIVAN,

called as a witness by the Plaintiff, first duly sworn,
testified as follows:

Direct Examination

By Mr. Cook:

Q. Will you state your name, please?

A. John F. Sullivan.

Q. Where do you reside? A. Seattle.

Q. What is your business?

A. I am associate manager of the Frank Burns Company, reinsurance brokers.

Q. How long have you been associated with that concern? A. Since October 1, 1942.

Q. Prior to that time with what department of the State of Washington were you connected?

A. With the Insurance Commissioner's Office.

Q. For how long? A. Since April 1, 1933.

Q. In what capacity? [80]

(Testimony of John F. Sullivan.)

A. As Deputy Insurance Commissioner.

Q. Are you familiar with the various forms of reinsurance contracts for specific insurance and also catastrophe insurance? A. Yes, I am.

Q. In your experience with the State Insurance Department what contact did you have with the cession of insurance business?

A. In connection with reviewing annual statements, examinations of companies, and general executive duties in the Department I had considerable contact with the reinsurance contracts of the domestic companies particularly.

Q. And your business now is devoted entirely to reinsurance brokerage business? A. It is.

Q. Are you familiar, Mr. Sullivan, with the meaning in the insurance trade of the term "net retention" as we have used it here in this trial?

A. Yes, I am.

Q. Will you explain to the Court what that is?

Mr. Dumett: Just a moment. This being a new witness I take it I should probably renew the objection that I have previously made to this line of testimony on all the grounds urged.

The Court: The objection is overruled.

A. Net retention as it is used in the trade means the amount which a company would retain of the risk for its own account of a policy of insurance which would have been issued for possibly a larger amount, and they may have ceded off or given off some of the risk to other companies through means of reinsurance.

(Testimony of John F. Sullivan.)

Q. Does specific reinsurance affect the amount of the net retention of the insuring company? [81]

A. Yes, sir; it does.

Q. And how and in what way?

A. If a company cedes off by means of specific reinsurance it reduces the amount it has at risk.

Q. Does catastrophe excess reinsurance affect in any way the net retention of an insuring company?

A. No, it does not.

Q. Why not?

A. Catastrophe reinsurance covers the whole spread of the company's business. As a matter of fact it is generally thought of as more or less surplus reinsurance.

Catastrophe reinsurance is purchased by all prudent companies with a view of eliminating the possibility of a serious shrinkage in surplus by reason of a large loss, and as far as affecting the particular risk, it applies to no particular risk, but applies to the whole spread.

The Court: Would it be more economical for the company instead of farming out part of its risk to take a proportion of the risk instead of originally becoming obligated to the extent of \$100,000 of insurance, why not just take a fourth of it? Would that not be more economical than to take it all and then farm out part of it?

A. It would not, for this reason. From the standpoint of the public, a company being able to issue a policy for \$100,000 of liability, which might be beyond its own ability to carry, by ceding off the

(Testimony of John F. Sullivan.)

excess liability it reduces the cost to the insured because only one policy is issued, and also the expense and commission that it bears for the proportion it cedes off is repaid by the company that reinsures.

Q. Is the existence or non-existence of a catastrophe reinsurance policy ever considered, to your knowledge, in determining net [82] retention of a company on a risk?

A. No, sir; it is not, to my knowledge.

Q. Have you ever known it to be considered in determining the net retention of a company?

A. I have never known it to be considered.

Q. Can you tell us of any additional reason why a consideration of the catastrophe insurance is not applicable in determining net retention?

A. The consideration of catastrophe insurance is not applicable because the question of whether or not catastrophe insurance will come into play is not known until the loss is determined. I can go on with an example.

Q. If you will, please.

A. Taking the case in hand here of the Tacoma Narrows bridge, there was some \$5,200,000 of insurance on the bridge, as far as the gross line to the State was concerned, and the Northwestern Mutual Fire Association wrote \$350,000 of it.

It had a retained line of \$50,000, considering the risk as being 50% subject, or probable maximum loss of 50%, and consequently the underwriter that handled it anticipated no loss in excess of \$25,000

(Testimony of John F. Sullivan.)

from any one individual loss on that bridge, and so if the loss had been of a different amount than it was—say instead of a \$4,000,000 loss it had been a \$400,000 loss—the net retention line of the company was \$50,000 whether there is a \$4,000,000 loss or a \$400,000 loss.

The fact that after the loss this catastrophe excess came into play has absolutely no connection and no underwriter could tell it would come into play on a given loss.

Q. Does the amount of the loss ultimately sustained have anything to do with the net retention as such? A. No, it does not. [83]

Q. Are they two separate and distinct matters?

A. They are entirely separate items.

Q. Can you make any further distinction between the term of “net loss” and “net retention” than you have already made?

A. Net loss to a company is the amount of money it pays out, taking into account salvage, and its specific reinsurance or even its catastrophe reinsurance, for that matter, but that is only taken into account at the time of the loss.

I don't think it would be possible for anyone to take into account a catastrophe cover at all, in setting your net retained line.

Q. In your experience in the insurance business have you ever known of any instance where catastrophe reinsurance has been considered in determining net retention?

(Testimony of John F. Sullivan.)

A. No, I do not.

Q. Are you familiar with the examinations made by the various departments of the domestic insurance companies in this State? A. Yes, I am.

Q. How often are those examinations made?

A. In the State of Washington the examinations are made of domestic companies annually.

Q. Once a year?

A. And every three years there is an examination made under the auspices of the National Insurance Commissioners' Insurance Examiners from outside states who are invited to participate with the Washington Examiners.

Q. What do those examinations show with respect to catastrophe policies carried by the domestic companies?

A. The examination reports reveal the existence of such covers and would explain it rather fully.

Q. Does that give the exact terms of them? [84]

A. No, sir, They summarize the terms of them.

Q. Do they give the limits? A. Yes, sir.

Q. Those examinations are required to be made by law? A. Yes, sir.

Q. Where are those reports filed?

A. As far as the State of Washington is concerned our domestic companies— and I believe it is the practice of all states—immediately upon release of an examination report the copy is sent to the company and to Best for publication in their monthly magazine, and a copy is sent to each state in which the company is licensed to do business.

(Testimony of John F. Sullivan.)

Q. Assuming the Northwestern Mutual Fire Association would be licensed to do business in the State of Rhode Island would the examination reports of the Northwestern made by the Insurance Department of this State be on file in Rhode Island? A. Yes, it would.

Mr. Dumett: I object to that as being argumentative.

The Court: The objection is overruled.

Q. Do those reports of the examinations purport to show the amount of risk which each company has on its books? A. Yes, sir; they do.

Q. Is that the same as the term "net retention?"

A. Well, it would show both their gross and their net.

Q. Both their gross and their net retention?

A. That is right.

Q. In those reports——

A. Over all, that is.

Q. Yes. In those reports then, made by the Insurance Department of this State, does the net retention as shown in the report take into consideration the existence of catastrophe reinsurance? [85]

A. No, it does not.

Mr. Cook: You may inquire.

Cross Examination

By Mr. Dumett:

Q. In the field of reinsurance, Mr. Sullivan, we

(Testimony of John F. Sullivan.)

have one type of reinsurance commonly referred to as pro rata reinsurance, do we not?

A. Yes, sir.

Q. And is that the type of reinsurance that is involved in this case where the ceding company retains \$50,000 and cedes \$50,000 to the reinsuring company? A. Yes, sir.

Q. On that kind of pro rata insurance if there was a loss on the subject matter of the insurance—in this case the Tacoma Narrows bridge—of 77% of the total insurance then the reinsuring company would pay 77% of \$50,000 and the ceding company the same proportion? A. Yes, sir.

Q. I suppose that is where they get the term “pro rata”? A. That is right.

Q. There is also, is there not, a well known type of reinsurance in which the reinsurer pays only in the event that the reinsured's loss exceeds a certain sum? A. Yes, sir.

Q. Is that sometimes called surplus insurance?

A. No, sir; excess insurance.

Q. Sometimes referred to as excess of loss insurance? A. That is right.

Q. And you may have an excess of loss reinsurance which is not limited to one catastrophe, may you not? [86] A. Yes, sir.

Q. And that is straight excess of loss reinsurance? A. Yes, sir.

Q. And there is another type of reinsurance, is there not, where if the reinsured suffers a loss of more than a certain sum, arising from one catas-

(Testimony of John F. Sullivan.)

trophe, the reinsurer pays? A. Yes, sir.

Q. And that is commonly called catastrophe excess of loss reinsurance? A. That is right.

Q. It is common, is it not, in reinsurance treaties to have a provision requiring the reinsured, in the event of a cession, to retain a specified amount or a specified proportion of the insurance?

A. That is right.

Q. One of the purposes of such a net retention clause is to insure the reinsurer that the reinsured, by retaining a substantial share of the insurance, will exercise diligence in the placing of the risk?

A. Yes, sir.

Q. And also that it will use due diligence in investigating and adjusting possible losses?

A. That is right.

Q. Now in the present case, going back to the time the cession in this case was made by the Northwestern to the Union, which was in June, 1940, and assuming that in June, 1940, \$50,000 of reinsurance, covering this Tacoma Narrows bridge, was ceded to the Union by the Northwestern, and the Northwestern saying that it was retaining \$50,000 on the same property, and assuming on that same date the Northwestern had in effect a catastrophe reinsurance policy which provided in the event of a [87] loss suffered by the Northwestern as a result of one catastrophe, in excess of \$30,000, the reinsurer on the policy would pay 90% of the balance up to \$50,000, assuming that, it was certain, as of that date, was it not,—on the date of the

(Testimony of John F. Sullivan.)

cession—that the very top amount of that insurance that the Northwestern would have been liable for, in the event of a total loss on the bridge, resulting from one catastrophe, would be \$32,000?

A. That is right.

Q. Referring to the annual statements you referred to, Mr. Sullivan, filed with the State by the insurance companies, do these annual statements filed with the insurance department actually show the amounts of insurances and reinsurances and risks of a particular company?

A. The annual statement?

Q. Yes.

The Court: Like that you expected to be filed, in Rhode Island for instance.

A. That is the examination report. The examination report does show it, but he is talking about the annual statement.

Q. Does the annual statement show what I have reference to? Do the annual statements you refer to, which I understand are filed with your Department,—who makes them out, the individual companies?

A. Yes, sir.

Q. Do the annual statements filed with the insurance department actually show the amount of insurances and reinsurances of a particular company at risk?

A. I believe they do—yes, they do. The examination report does. [88]

Q. Is that the one made out by the Department?

A. Yes, sir.

(Testimony of John F. Sullivan.)

Q. As a result of its examination of each company? A. That is right.

Q. Do those examination reports show that?

A. Yes, sir; they do.

The Court: Do you mean to say both the financial statement and also the examination report show the items of information mentioned by Mr. Dumett?

A. I believe they both do. I am sure the examination report does, and I am pretty sure the schedule does.

Q. (By Mr. Dumett) But you are not sure about that? A. That is right.

Mr. Dumett: That is all.

Redirect Examination

By Mr. Cook:

Q. Referring to the hypothetical question put to you by Mr. Dumett, where he assumed the total loss that the company could have had was \$32,000 from any one catastrophe on the bridge, assuming that that same windstorm had done enough damage in the community there to other property insured by the Northwestern to exhaust the limits of the plaintiff's Exhibit "1", what effect would that have had upon their liability on the bridge?

Mr. Dumett: The Northwestern?

Mr. Cook: That is right.

A. I am not sure I follow you, Mr. Cook. If the limits of this \$30,000 had been exhausted?

Q. This has limits beginning at \$30,000 and up to \$200,000. A. Yes, sir.

(Testimony of John F. Sullivan.)

Q. Assuming this storm had damaged other property insured by the [89] Northwestern to an amount in excess of the \$200,000 limit, what effect would that have had on the Northwestern's liability on the bridge?

A. The Northwestern would still be liable for the full amount of the policy on the bridge.

Q. For the full \$50,000?

A. That is right.

Mr. Cook: That is all.

(Witness excused.)

JOHN J. BEALL,

Called as a witness by the Plaintiff, first duly sworn, testified as follows:

Direct Examination

By Mr. Cook:

Q. You may state your full name, Mr. Beall?

A. John J. Beall.

Q. Where do you reside?

A. In the City of Seattle.

Q. What is your business?

A. I am executive vice-president of the Northwestern Mutual Fire Association.

Q. And you have been connected with that organization how long?

A. For twenty-three years.

Q. State briefly the nature of your duties.

(Testimony of John J. Beall.)

A. Almost from the start of my employment with that company on November 1, 1920, I became connected with the reinsurance department, and it has been my position in all of these years to solicit contracts of reinsurance, both assumed and ceding, and to supervise the acceptance and ceding of reinsurance.

I now have other duties in addition, underwriting [90] supervision and production.

Q. But you still have those duties?

A. I still retain that responsibility.

Q. Will you identify Plaintiff's Exhibit "1" as being the catastrophe excess contract in force at the time of the ceding of the insurance to the Union which is involved in this case (Handing to witness)?

A. This is the contract.

Q. And also in effect at the time of the loss?

A. That is correct.

(Thereupon said Plaintiff's Exhibit "1" was admitted in evidence. [91])

PLAINTIFF'S EXHIBIT 1

Lloyd's Policy

(Subscribed only by Underwriting Members of Lloyd's who have complied in all respects with the requirements of the Assurance Companies Act of 1909 as to security and otherwise.)

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

\$200,000 covering
90% of the excess
of \$30,000 loss,
each and every loss.

Printed at Lloyd's, London, England.

Whereas C. T. Bowring and Company (Insurance) Limited and/or as Agents of.....
(~~hereinafter called "the Assured"~~), have paid
U. S. \$18,000.

Canadian \$2,000. Premium or Consideration to Us,
who have hereunto subscribed our Names to ~~insure~~
~~against Loss as follows:~~ Reinsure the Northwestern
Mutual Fire Association of Seattle, Washington,
and applying to their business in the United States
of America and Dominion of Canada in accordance
with Cover No. 81252 and subject to all terms and
conditions thereof and/or contained in agreements
relating thereto.

In consideration of the terms under which this
Policy is issued, the Reinsured Company under-
takes not to claim any deduction in respect of the
premium hereon when making tax returns, other
than Income or Profits Tax returns, to any State
or Territory or the District of Columbia.

This Policy only covers in respect of losses oc-
curring during the period commencing with 12:01
a.m. the First of January, 1940 and ending with
12:01 a.m. the First of January, 1941, ~~both days~~
~~inclusive.~~

If the ReAssured shall make any claim knowing

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

the same to be false or fraudulent, as regards amount or otherwise, this Policy shall become void, and all claim thereunder shall be forfeited.

Now Know Ye, that We the Underwriters do hereby bind Ourselves, each for his own part, and not one for Another, Our Heirs, Executors, and Administrators, to pay or make good to the ReAssured or to the ReAssured's Executors, Administrators, and Assigns, all such Loss or Damage as aforesaid as may happen to the subject matter of this ReInsurance, or any part thereof during the continuance of this Policy; not exceeding the Sum of Two Hundred Thousand Dollars, each and every loss, such payment to be made within Seven Days after such Loss is proved and that in proportion to the several Sums by each of Us subscribed against our respective Names not exceeding the several Sums aforesaid.

In Witness whereof We, Underwriting Members of Lloyd's, have subscribed our Names and Sums of Money by Us reinsured.

Dated in London, the Nineteenth Day of April, One Thousand Nine Hundred and Forty.

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

No. 81252

Contract of Insurance

Effected by

C. T. Bowring & Co. (Insurance), Ltd.,

52 Leadenhall Street, London, E. C. 3.

Reinsurers Lloyd's

In consideration of the terms under which this Contract is issued, the Reinsured Company undertakes not to claim any deduction in respect of the premium hereon when making tax returns, other than Income or Profits Tax returns, to any State or Territory or the District of Columbia.

19th April, 1940

We certify and declare that we have effected the following Contract of Insurance summarized hereunder, of which a copy is attached hereto.

For Account of The Northwestern Mutual Fire Association, of Seattle, Washington.

Excess of Loss Contract always open from 12:01 a.m. the First day of January, 1940, subject to Sixty days' written notice of cancellation.

Applying to the business of The Northwestern Mutual Fire Association in the United States of America and/or Dominion of Canada and to apply only to losses which occur during the currency of this Contract.

Limited to \$200,000 each and every loss being 90% of the excess of \$30,000 loss each and every loss.

Premium of U. S. \$18,000 and Canadian \$2,000 to

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

be paid hereon on the First day of January each year.

C. T. BOWRING & CO. (INSUR-
ANCE) Ltd.

WM. M. PRYCE
Director.

Addendum

Attaching to and forming part of Contract No. 81252.

Issued to: The Northwestern Mutual Fire Association.

(Catastrophe Contract)

It is understood and agreed that the following Articles are added to the conditions of this Contract.

Service of Suit Clause.

17. It is agreed that in the event of dispute as to the validity of any claim made by the Reinsured Company under this Contract, Reinsurers hereon, at the request of the Reinsured Company, will submit to the jurisdiction of the United States District Court in the Federal District in which the principal office or address of the Reinsured Company is located and will comply with all legal requirements necessary to give such Court jurisdiction, and that in any suit instituted by the Reinsured Company against any one or more of them upon this Con-

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

tract, Reinsurers hereon will abide by the final decision of such Court or any Appellate Court, in the event of an appeal, provided, however, that if the Federal Courts do not have or refuse jurisdiction for any reason, Reinsurers will submit to the jurisdiction of the Courts of the State in which the principal office or address of the Reinsured Company is located.

Messrs. Duncan and Mount, 27, William Street, New York, and/or their nominees are hereby duly authorized and empowered to accept service on behalf of Reinsurers on submission to jurisdiction as aforesaid.

Arbitration Clause.

18. As a condition precedent to any right of action hereunder if any dispute shall arise between the Reinsured Company and the Reinsurers with reference to the interpretation of this Contract or the rights with respect to any transaction involved, the dispute shall be referred to two Arbitrators, one to be chosen by each party and such Arbitrators shall choose an Umpire before entering upon the reference and in the event such Arbitrators shall fail to agree, the decision of said Umpire shall be final and binding upon all parties. The Arbitrators and the Umpire shall interpret this Contract as an honourable engagement and they shall make their award with a view to effecting the general purpose of this Contract in a reasonable manner, rather than in accordance with a literal interpreta-

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

tion of the language. Said Arbitration to be held in New York, U.S.A. unless the disputants agree otherwise.

As agreed by Reinsurers,

C. T. BOWRING & CO., (Insurance) LIMITED,

WM. M. PRYCE

Director.

All other terms and conditions of the Contract remaining unchanged.

Dated, London, 18th July, 1940.

JL/FH

Attaching to and forming part of Contract No. 81252.

Northwestern Mutual Fire Association
of Seattle, Washington

1. In consideration of the premium and the other stipulations named hereinafter,

Various Underwriters at Lloyd's, London
(hereinafter referred to as the "Reinsurers").

do hereby reinsure the

Northwestern Mutual Fire Association,
of Seattle, Washintgon (hereinafter
referred to as the "Reinsured Company"),

as follows:—

2. This agreement is Excess Reinsurance by the Reinsurers, in favour of the Reinsured Company,

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

and applies blanket to all hazards written by the Reinsured Company, (liability assumed under Excess reinsurance contracts excluded) on property wherever located in the United States of America and/or Dominion of Canada.

3. "Earthquake" as covered under this Contract is understood to mean any earthquake and/or series of earthquakes occurring at the same general location during any one period of twenty-four consecutive hours.

"Windstorm and Hail" as used in this Contract shall be construed to include loss to the Reinsured Company from Windstorm, Cyclone, Tornado and resulting loss including Fire (if covered under Windstorm Policies) and Hail.

"One loss" from these hazards is hereby agreed to include all windstorm and hail losses (above defined) sustained by the Reinsured Company within a 48 hour period beginning with the moment of the occurrence of the first loss to be included in any claim under this Contract.

4. The Reinsurers are not liable for any loss or damage unless the Reinsured Company has paid or has become liable for a nett amount in excess of Thirty Thousand Dollars in any one loss, and then only for 90% of the amount of such loss or damage in excess of Thirty Thousand Dollars but in no event to exceed Two Hundred Thousand Dollars.

5. The Reinsured Company agrees to notify the Reinsurers in case it makes any fundamental

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

changes in its underwriting policy with respect to nett lines.

6. The amount of loss in excess of which liability attaches hereunder is understood and agreed to be the ultimate nett loss of the Reinsured Company on its nett retained lines only; and no claim is collectible hereunder unless the Reinsured Company has paid or has become liable for a sum or sums in respect of any one loss in excess of the nett amount mentioned above; and 90% of any salvage or recovery made in respect of any such loss (except any amount of such recovery necessary to reduce the said ultimate nett loss to an amount equal to the amount of this Cover plus the retained line hereunder of the Reinsured Company) is for the benefit of the Reinsurers up to the amount of any such loss paid by the Reinsurers. However, nothing in this Contract shall be construed as meaning that losses are not recoverable hereunder until the ultimate nett loss of the Reinsured Company has been ascertained. The Reinsured Company shall return to the Reinsurers their proportion of any amount recovered by salvage or subrogation within ten days after such recovery. The phrase "ultimate nett loss" as used in this Contract means the sum or sums (after the deduction of all recoveries and salvages) paid by the Reinsured Company in the settlement of claims and suits and in satisfaction of judgments (including expenses of litigation and other loss expenses) under its policies or contracts,

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

but it does not include remuneration of home office employees of the Reinsured Company.

7. It is understood and agreed that the occurrence of a Fire and/or Earthquake and/or other loss at the same time and at the same general location shall be treated as one and the same loss under this Contract and not as a separate loss for each hazard.

8. Pro rata and/or other excess reinsurance on the business covered hereunder is permitted. Pro rata and/or other excess reinsurance shall be first exhausted before this Contract applies.

9. In case a loss occurs involving liability under this Contract, the Reinsured Company agrees to give the Reinsurers notice of same as soon as possible; and the Reinsurers shall have the right to participate in the adjustment of each loss hereunder if they so elect. Any loss under this Contract shall be paid by the Reinsurers promptly upon receipt of proofs.

10. The Reinsured Company, at its regular place of business shall produce for examination upon the request of a representative of the Reinsurers all books, papers and documents pertaining to the business covered by this Contract; and in the event of a claim being made under this Contract shall produce for examination and verification all books, papers and documents pertaining to losses paid and/or incurred and reinsurance collected or to be collected on the business covered hereunder.

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

11. If loss occurs, the amount thereof is automatically reinstated, in consideration of a reinstatement premium for the balance of the then current calendar year; with the understanding, however, that the Reinsurers' liability under this Contract shall never be more than Two Hundred Thousand Dollars in respect of any one loss or series of losses arising out of one event. Said reinstatement premium shall be calculated and paid at the end of said calendar year, and the reinstatement premium shall be a pro rata portion of the total amount of the annual premium of \$20,000 on this Contract, being "pro rata" both as to the fraction of the calendar year unexpired at the time of the occurrence of the loss and as to the fraction of the amount of the cover which was reinstated, (e.g. if a loss exhausting one-half of the amount of this cover should occur when one-fourth of the calendar year was as yet unexpired, the reinstatement premium due by reason of that loss would be equal to one-eighth of the annual premium of \$20,000 on this Contract).

As regards the hazards of Malicious Mischief Vandalism

It is agreed that for the purposes of this Contract the term "loss" shall mean all losses occurring in an area of one square mile during a period of 24 consecutive hours.

It being understood, however, that Reinsurers' liability hereon is limited to \$200,000 in

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

respect of any one loss and in all in respect of all losses during any one Calendar Year.

12. This Contract is for an unlimited period beginning at 12:01 a.m. Standard Time, the 1st Day of January 1940, but may be terminated by either party at the end of any calendar year by giving sixty (60) days' notice of such cancellation in writing.

13. It is understood that wherever the sign "\$" or the word Dollars appears in this Policy it shall be constructed to mean United States Dollars excepting in those cases where the policies are issued by the Reinsured Company in Canadian Dollars in which cases it shall mean Canadian Dollars.

In the event of the Reinsured Company being involved in a loss requiring payment in United States and Canadian Currency, the Reinsured Company's reunion and the amount recoverable hereunder shall be apportioned to the two currencies in the same proportion as the amount of ultimate nett loss in each currency bears to the total amount of ultimate nett loss paid by the Reinsured Company.

14. Mutual Marine Conference Warranty

Warranted the Reinsured Company shall not by the Chief Executive in the United States of the Reinsured Company whether elected or appointed or by its United States Attorneys in Fact or their partner(s) authorise or accept any risk on classes of business under the jurisdiction of the Mutual Marine Conference on a basis contrary to the forms,

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

rates, rules or commissions of that Conference provided that errors or omissions on the part of the Reinsured Company shall not prejudice this Contract the Reinsured Company agreeing on its part to correct such errors or omissions upon the same coming or being brought to its attention.

15. North American War Exclusion Clause (Internal Risk)

As regards interests which, at time of loss or damage, are Within the territorial limits of U.S.A. and Canada no liability shall attach hereto in respect of any such loss or damage which is occasioned by War, Invasion, Hostilities, Acts of Foreign Enemies, Civil War, Rebellion, Insurrection, Military or Usurped Power or Martial Law or Confiscation by order of any Government or Public Authority but this shall not be construed as relieving the Underwriters of liability for loss or damage which would be recoverable under a U. S. Standard Fire Policy containing a Standard War Exclusion Clause or a U. S. Explosion Conference Standard Riots and Civil Commotion Policy (containing "Mandatory Endorsement") with Vandalism and Malicious Mischief Endorsement No. 228/U/1 or No. 228/U/2 attached thereto or Vandalism and Malicious Mischief Endorsements in use by the Reinsured Company prior to 1st September, 1939, which may continue to be used by the Reinsured Company.

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

16. It is understood and agreed that the Reinsured Company has underlying Excess of Loss Contracts for \$100,000 excess of \$10,000 loss, in respect of their Automobile Business \$75,000 covering 90% of the excess of \$15,000 loss, each and every loss in respect of Grain and \$125,000 any one risk covering 90% of the excess of \$12,500 any one loss any one risk in respect of Tornado, etc., and recoveries thereunder are to inure to the sole benefit of the Reinsured Company and shall not be taken into account in computing the ultimate nett loss to them for the purposes of this Contract.

It is warranted by the Reinsured Company that the Automobile and Tornado Reinsurances above-mentioned will be maintained by them during the currency of this Contract.

BON/ER

19/4/40.

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

TARGET RISKS EXCLUSION CLAUSE

It is expressly understood and agreed that effective as and from the undermentioned dates no liability shall attach hereto in respect of the following risks and/or other risks as may hereafter by mutual agreement be included by endorsement hereto and that no liability in respect of such risks shall be included in the retention warranted hereon or in the amount of loss in excess of which this policy attaches:—

George Washington Bridge.....	A/c Port of New York Authority.....	1st April, 1939.
Holland Tunnel	A/c Port of New York Authority.....	1st April, 1939.
Lincoln Tunnel (Midtown Tunnel).....	A/c Port of New York Authority.....	1st April, 1939.
San Francisco Oakland Bay Bridge.....	A/c California Toll Bridge Authority.....	14th December, 1938
Golden Gate Bridge	A/c Golden Gate Bridge & Highway District	1st October, 1940.
Mellon Collection of Fine Arts.....	A/c A. W. Mellon Educational and Charitable Trust Washington	Date of attachment under Target Risk Scheme.
Frick Collection of Fine Arts.....	A/c Trustees of the Frick Collection, Inc., 1, East 70th Street, New York, N. Y.	1st March, 1939.
Kress Collection of Fine Arts.....	A/c S. H. Kress and/or The Samuel H. Kress Foundation, 1020, Fifth Avenue, New York, N. Y.	1st March, 1939.

(Testimony of John J. Beall.)

Plaintiff's Exhibit 1—(Continued)

Target Risks Exclusion Clause—(Continued)

Exhibits (Fine Arts) at and from various points and places in the United States and Canada to Repositories in New York, while there and to World's Fair, while there for exhibition and return to various points and places in the United States and Canada (or as original)	A/e Art Associates, Inc.....	1st April, 1939.
Paintings, Objects of Art and other items loaned for exhibition and covered in the premises of the Palace of Fine & Liberal Arts on Treasure Island at San Francisco Bay, including inland transits and whilst temporarily located at places other than the said Palace of Fine & Liberal Arts (or as original)	A/e San Francisco Bay Exposition and the Owners of Objects of Art loaned for Exhibition	1st February, 1939.
Bronx-Whitestone Bridge	A/e Triborough Bridge Authority, New York City	29th April, 1939.

(Testimony of John J. Beall.)

Q. Now, Mr. Beall, let me ask you generally the same questions I have the other witnesses in this case, to tell the Court the meaning in insurance language, and in the insurance business of the term "net retention", as we have used it here in this trial.

A. Net retention refers to the liability which the primary insurance company——

Mr. Dumett: Just a moment. I suppose I should, as a matter of form, renew the objection.

The Court: Yes. The objection is overruled.

A. Net retention refers to the amount of the primary insurance for which the primary company is liable, less the amount of specific reinsurance ceded. Could I give a simple illustration?

Q. If you will, please.

A. In the case of the Tacoma Narrows bridge the Northwestern assumed **liability to the Toll Bridge Authority** of \$350,000. [94] It had placed reinsurance totaling \$300,000. Its retention was \$50,000, the amount of our liability to the Toll Bridge Authority, less the amount of our reinsurance specifically placed.

Q. Does the existence of catastrophe reinsurance, such as evidenced by Exhibit "1", have any effect on the amount of retention?

A. No, sir.

Q. Why not?

A. Largely because of the impossibility of determining its effect. It is not related to any in-

(Testimony of John J. Beall.)

dividual risk. It has no application to an individual risk, but rather it applies only to a catastrophe.

Q. It may have some effect on the loss?

A. Yes, sir.

Q. Is there a distinction between loss and retention? A. Yes, sir; very definitely.

Q. What is it?

A. Retention is the portion of the line on which you pay so the loss will be pro-rated. The loss is the amount you finally have to pay. The net payment on this case at issue might be anywhere from \$1.00 to \$50,000, but your retention would be \$50,000 even on a \$1.00 loss, and there is no similarity whatever between retention and loss.

Q. You mentioned the use of it in pro-rating, I believe? A. That is right.

Q. Can you explain that in any more simple language to the Court? How is a retention used as a basis of pro-rating?

A. Pro rata reinsurance is sometimes referred to as contributing reinsurance, and the adjustment of the loss is proportionate to the pro-ration of the premium. Frequently reinsurance is [95] in fractions or in percentages.

We will retain half the line and pay half the premium to the reinsurer, and the reinsurer pays half the loss, whatever it may be. That is pro-rata or contributing reinsurance, and the basis of pro-rating the loss is the amount of the liability ceded or retained.

(Testimony of John J. Beall.)

Q. Referring specifically to this policy of \$350,000, how was the share of each company figured?

A. It was determined in accordance with the authorization of the reinsurance contracts, but in some cases because the line was a bit out of the ordinary, specific approval of the cession is secured in an abundance of precaution.

Q. How was the ultimate payment to the Toll Bridge Authority figured? A. Our share?

Q. Your share and the other reinsuring companies' shares?

A. As I understand it, we had a direct share to the extent of seven percent, and our payment to the Toll Bridge Authority was 7% of the total payment, and we had reinsured 33%, 30/35ths of our liability, and each company was 100-rated on its share of the loss in proportion to its share of the original liability and the premium.

Q. Incidentally, how many other companies besides the Union did you cede insurance to out of this policy for \$350,000?

A. Fourteen other companies.

Q. And all of the other fourteen companies paid the Northwestern their proportionate share of the loss? A. They did.

Mr. Dumett: I object to that as being immaterial.

The Court: That objection is sustained. [96]

Q. Will you state what the accepted usage and practice in the insurance world is about consid-

(Testimony of John J. Beall.)

ering catastrophe reinsurance in determining net retention of an insurance company?

A. Possible recovery under catastrophe contracts is entirely disregarded in respect to retentions.

Q. Handing you Plaintiff's Exhibit "3" for identification, will you tell the court what that is?

A. This is the certificate copy of a daily report of reinsurance placed by the Northwestern with the Union.

Q. Those are how many, seven or eight?

A. Eight or ten.

The Court: It concerns other contracts of insurance other than such as your concern had with the Tacoma Narrows Bridge?

A. One actually is the Tacoma Narrows bridge, and the others are comparative. They are other risks.

Q. (Mr. Cook): Is that the Washington Toll Bridge Authority?

A. Pardon me. It is the Toll Bridge.

Q. Are these documents a part of the records and files of your company?

A. That is correct.

Q. And duplicate whites rather than yellow are forwarded to the Union? A. That is right.

Mr. Cook: We offer Plaintiff's Exhibit "3" in evidence.

Mr. Dumett: Are the copies sent to the Union exact duplicate or is there some difference?

(Testimony of John J. Beall.)

A. The form is slightly different but the portion which is produced for that particular relationship is identical because they are prepared on a ditto master, but they are filled in with the names of the companies, and the like.

Mr. Dumett: Is the typewritten matter the same? [97]

A. Yes, sir. You will observe those are prepared with a ditto, and they come from the same master.

Mr. Dumett: No objection.

The Court: It may be admitted.

Thereupon these daily reports were admitted in evidence as Plaintiff's Exhibit "3", which consists of sheets 1 to 9, inclusive, each sheet being on a printed form bearing printed title as follows:

Certificate of Reinsurance placed by the
Northwestern Mutual Fire Association
Seattle, Washington
with
Union Mutual Fire Insurance Company
Providence, Rhode Island

The material parts of these sheets are as follows:

Sheet 1

Amount \$40,000 on its policy or policies.....
issued for the term of 1 year to Mead and Mount
Construction Company et al.

Northwestern retains (a) identical \$40,000 (b)
other in or on \$20,000 R.R.C. P.M.L. 50%. Pro-
tection 2.

(Testimony of John J. Beall.)

Synopsis or Copy of Form

On the three and four story approved roof fire resistive building occupied as a residence quarters A. C. Barracks—Lowry Field, situate East Sixth Ave. and Quebec St., suburban to Denver, Colorado. 90% coins.

Sheet 2

Amount M \$40,000 A \$24,444 on its policy or policies [98] issued for the term of 1 year to Bercut Richards Packing Co., a corporation.

Northwestern retains (a) identical \$50,000 (b) other in or on \$......P.M.L. 30% Protection 4.

Synopsis or Copy of Form

M \$810,000 or 30% of the total insurance on the following form: \$2,700,000 on stock contained on premises situate on premises on North Seventh St., Bet. North "F" St. and American River, and K/A Main Plant premises, Sacramento, California. \$10,000 at any other location.

Provisional Insurance.

Sheet 3

Amount \$100,000 on its policy or policies..... issued for the term of 5 years to Bd. of Ed. Granite School Dist., Salt Lake Co.

Northwestern retains (a) identical \$100,000 (b) other in or on \$......P.M.L. 11%. Protection 4.

Synopsis or Copy of Form

On all property contained on premises occupied

(Testimony of John J. Beall.)

for school purposes and situate in Salt Lake County, Utah. 90% coins.

Sheet 4

Amount \$50,000 on its policy or policies.....
issued for the term of 5 years to Washington Toll
Bridge Authority, et al.

Northwestern retains (a) identical \$100,000 (b)
other in or on \$......P.M.L. 25% Pro-
tection.....

Synopsis or Copy of Form

On the Lake Washington Bridge and Approaches
connecting Seattle and Mercer Island in the State
of Washington. [99]

Sheet 5

Amount \$30,000 on its policy or policies.....
issued for the term of 3 years to Union Lumber
Co. and/or The Mendocino Lumber Co.

Northwestern retains (a) identical \$50,000 (b)
other in or on \$...... P.M.L. 35% Pro-
tection 3A.

Synopsis or Copy of Form

On all property contained on premises occupied
for woodworking purposes and situate premises the
southerly boundary of which is the Noyo Harbor,
the northerly boundary is Pudding Creek, the east-
erly boundary is the County Road outside of the city
limits of Fort Bragg, and the westerly boundary
is the Pacific Ocean, and in Mendocino City, Cali-
fornia.

(Testimony of John J. Beall.)

Sheet 6

Amount \$35,000 on its policy or policies.....
issued for the term of 3 years to Northwest Door
Company.

Northwestern retains (a) identical \$35,000 (b)
others in or on \$.....P.M.L. 60% Pro-
tection 2-A.

Synopsis or Copy of Form

On all property contained on premises occupied
for woodworking purposes and situate on the East
side of the City Waterway, and South of the Elev-
enth St. Bridge on Blk 40, Tacoma Tide Lands,
Tacoma, Washington.

90% coins.

Sheet 7

Amount \$40,000 on its policy or policies.....
issued for the term of 5 years to California Toll
Bridge Authority, et al.

Northwestern retains (a) identical \$200,000 (b)
other [100] in or on \$50,000 U & O. P.M.L.....%.
Protection

Synopsis or Copy of Form

On Bridge spanning San Francisco Bay between
San Francisco and Oakland, California.

Sheet 8

Amount \$40,000 on its policy or policies.....
issued for the term of continuous to San Francisco
Bay Exposition.

Northwestern retains (a) identical \$45,000 (b)

(Testimony of John J. Beall.)

other in or on \$2500 Blkt. Form. P.M.L. 20%. Protection

Synopsis or Copy of Form
Fine Arts Floater

To cover property principally located in the Palace of Fine and Liberal Arts on Treasure Island, San Francisco Bay, California.

Hazards: All risks of loss or damage including transportation to or from any point in the United States, Canada or Mexico.

Sheet 9

Same as Defendant's Exhibit A-5.

Q. (Mr. Cook): Now, if you will refer to Plaintiff's Exhibit "3", is that not true that each one of those sheets cedes to the Union an amount of insurance in excess of \$25,000?

A. That is correct.

Q. By what right or understanding was such amount ceded by those documents, in view of the contract restriction of \$25,000?

A. Because in our form more than a single risk was involved.

Q. Will you explain that more in detail?

A. If I seem to be going too far stop me. Under our theory of underwriting we will estimate the possibility of a loss as much as \$25,000 on a single risk. That is to us the percentage of valuation which in our judgment is subject to a loss in a [101]

(Testimony of John J. Beall.)

single event. The percentage in the case of a fire within a single fire area. If we find in our judgment the entire property is not subject to a single loss possibility or probability then we will show that estimate through a PML percentage, a probable maximum loss.

For instance, we will say because of the existence of a fire wall this loss will be confined to this section of the building, representing 50% of the valuation, and our PML on that value would be 50%, and we would underwrite it as two risks, and we could not give one of our reinsurers twice as much of the whole value as we would accept on a single risk.

Q. What on the dailies indicate to the Union the number of risks which you have underwritten—is that indicated on your cession to them of the re-insurance on the Tacoma Narrows bridge?

A. Yes, sir.

Q. How many risks did you underwrite the bridge as? A. As two risks.

Q. Why?

A. Because in our judgment no one event would create a loss to the total number of units involved in the bridge.

Q. Your judgment was in error?

A. I wouldn't agree to that.

Q. You would not? A. No.

Q. But at the time the policy was issued and this insurance ceded to the Union it was your judgment, the judgment of the company in underwrit-

(Testimony of John J. Beall.)

ing, that the possible maximum loss from any one event would not exceed 50% of the value?

A. That is right.

Q. Is that correct? [102]

A. That is correct.

Q. Are you prepared to say you used your good judgment in making such an appraisal on that risk?

A. Yes, sir.

Q. And you acted in good faith in so doing?

A. That is true.

Q. How long have you done business with the Union on that basis?

A. Since 1928.

Q. Have you ever had any other manner of indicating to them the basis upon which you were ceding the insurance to them?

A. Never at any time.

Q. Is the Northwestern admitted to do business in Rhode Island?

A. It is. It has been continuously, I think since about 1920.

Q. What have you to say as to your knowledge first of all of catastrophe contracts carried by other companies?

A. Since I try to sell catastrophe contracts and since I am responsible for the integrity of the reinsurance which we purchase, it has been my position and job to become acquainted with the catastrophe reinsurance.

Q. What has been the fact as to whether or not the insurance companies universally carry catastrophe reinsurance?

(Testimony of John J. Beall.)

A. I know of no reputable company that doesn't carry it.

Q. Where is the information concerning the type of catastrophe coverage that a company has available to any one who may want to know about it?

A. The Best Reports and the Spectator System. And I have viewed the examination reports. I look at the Best insurance cases which comes to the office of virtually every insurance company, and they report the examinations of insurance companies.

Q. You were in court when Mr. Legris read to the court the paragraph out of Best's concerning the catastrophe contract of the [103] Northwestern?

A. I was.

Q. Are you familiar with that provision in the Best Reports? A. I am.

Q. How long has that provision describing that catastrophe contract been in Best Reports, to your knowledge?

A. As long as I have been interested in Best reports. I would say for seventeen or eighteen years fully.

Q. I understand that the Union ceded insurance to the Northwestern on the same basis that the Northwestern in this case had ceded this \$50,000 to them? A. That is right.

Q. And was that done by similar documents to Exhibit "3", those daily reports?

A. Very similar.

Q. On any of those reports ceding insurance

(Testimony of John J. Beall.)

to you were you ever advised of the fact that the Union carried excess catastrophe contracts of any kind? A. Never.

Q. You knew they did?

A. I knew they did.

Q. Why would such information not appear on the dailies which you sent to them or the dailies which they sent to you?

A. Because of the general understanding it has no application to the pro rata reinsurance.

Mr. Dumett: Just a moment—well, go ahead.

Q. Who negotiated the reinsurance contract with the Union under which this reinsurance was ceded to them? A. I did, personally.

Q. When?

A. I believe the year was 1928. The place was Milwaukee, [104] Wisconsin and I was talking with Mr. Easton, the former vice-president.

Q. Do you recall his initials?

A. No, I do not.

Q. Is he now connected with that company?

A. I think he has retired.

Mr. Dumett: Eastman?

A. Easton.

Q. (Mr. Cook): And is that the same general contract under which this particular business was ceded to the Union?

A. If it is not the identical contract there has been no modification in its terms.

Q. What discussion at that time did you have with the Union concerning the method of reporting

(Testimony of John J. Beall.)

the number of risks, the method of your doing business with them, and the existence or non-existence of catastrophe reinsurance carried by you?

Mr. Dumett: Just a minute, before you answer. Go ahead. I am sorry I interrupted you.

A. I recall the question.

Q. Go ahead and answer it.

A. My meeting with Mr. Easton took place at the occurrence of the National Association of Mutual Companies at the Milwaukee convention. I recall Mr. Easton looking me up and proposing the relationship, and up to that time we had no relation, and I was not well acquainted with the company.

The Court: Can you not make it shorter?

Q. Try to be more brief in your answer.

A. I was trying to explain why I remembered it. He offered an equal line with us, and that seemed a surprisingly large amount for a company of its size, and I went into a great deal more detail than I normally would. [105]

Mr. Dumett: That was in 1928?

A. Yes.

Mr. Dumett: In view of that statement of the conversation, I think I should interpose an objection on the ground that the contract on which this suit is based is dated January 1st, 1940, and it is a well established rule that any oral agreements or understandings or negotiations that may have occurred prior to the date of the contract are merged in the contract and cannot be admitted to modify or extend a written contract.

(Testimony of John J. Beall.)

Apparently this is to show some understanding or agreement, express or implied, some oral agreement between the witness on the stand and the Union through an officer who is no longer with the company, all of which was long prior to the date of the execution of this written contract, and I submit it is not material at all and would have no effect on this written contract under the well known rule, and I object to it as irrelevant and immaterial.

Mr. Cook: This evidence is not offered to have anything to do with this contract at all, but it is being offered to show knowledge on the part of the defendant of the existence of this contract of catastrophe reinsurance.

The Court: Is that contract in evidence?

Mr. Cook: That is Plaintiff's Exhibit "1".

The Court: That objection is overruled. Be as brief as possible.

A. We had a complete discussion of our underwriting program and our theories along that line.

Mr. Dumett: Just a moment.

Mr. Cook: This goes merely to the fact that the defendant had knowledge of the fact that we carried such a contract, actual knowledge. [106]

The Court: You may proceed with the answer.

A. We had a complete discussion of our underwriting program and of the reinsurance each company carried.

Q. As a part of the discussion was the matter

(Testimony of John J. Beall.)

of catastrophe contracts of insurance discussed?

A. Yes, sir.

Q. Was he advised at that time of the Northwestern's policy of carrying such contracts?

A. He was.

Q. One thing further, please. The contract which is alleged in Paragraph 3 of the Amended Complaint, the reinsurance agreement with the Union, has that been cancelled, and if so when was it cancelled?

A. It has been cancelled.

Q. Do you have any document——

A. I have a letter from Mr. Legris notifying me of the cancellation.

A. The agreements governing cessions have been cancelled by letter dated January 8, 1942, giving us thirty days' notice of cancellation.

Q. There has been no new business written since that date?

A. That is right.

Q. But the cessions which were in force at the time of the cancellation were not affected in any way?

A. Not prior to their determination.

Mr. Cook: That is all.

Cross Examination

By Mr. Dumett: [107]

Q. I understand your testimony is that the caption PML, meaning probable maximum loss, while appearing on the daily report or certificate of cession covering the reinsurance in suit indicates, you say, there is more than one risk involved?

(Testimony of John J. Beall.)

A. Yes, sir.

Q. I think you said it indicates there were two risks?

A. 50% would indicate two and 25% would indicate four.

Q. And is that true wherever on your daily reports or certificates of reinsurance you indicate PML such and such percentage?

A. If it is less than 100% in our judgment there was more than one risk involved.

Q. Assume a building in the City of Seattle in the midst of one of our best fire districts, and assume it is a one-risk building, and assume another identical building, and again assume it is a one-risk building but out in a rural district away from fire protection, you might place an estimate of a different amount of probable maximum loss on those buildings? A. Probably not.

Q. It could be done?

A. My construction of the probable maximum loss means the fire department didn't get there. In other words, what happens if the fire department doesn't get there, and the existence of protection is not a consideration in fixing the PML.

Q. You don't consider that at all?

A. No, sir; not fire protection.

Q. But generally speaking it is so used by insurance companies, is it not?

A. Not by those with whom I am doing business and with which I am acquainted.

(Testimony of John J. Beall.)

Q. You never heard the term "PML" used in connection with fire protection facilities? [108]

A. No, sir.

Q. Does PML ever have any reference to the fire-proof nature of the building itself?

A. Very often, yes. If the fire proof construction is such to cut off fire areas of the building, a fire proof wall whether vertical or horizontal, will create a new risk.

Q. When you say the probable maximum loss with reference to a particular structure is so much you are in effect saying in your best judgment the greatest loss that can occur to that building is approximately so much?

A. Yes, sir.

Q. Your insurance may be in a larger amount and the actual amount of the value of the building may be a larger amount, but you do not consider the loss will run more than a percentage of it?

A. It is a percentage of the valuation subject to a single loss rather than the amount of the loss itself which it shown by the PML estimate.

Q. Have you any way of indicating to your reinsurers, as you do not use PML for that purpose, your judgment as to what the probable maximum loss is by virtue of fire-proof construction or lack of fireproof construction on a building?

A. Is that a question?

Q. Yes. A. I will have to have it read.

(Last question read.)

The PML will show our estimate of the per-

(Testimony of John J. Beall.)

centage of valuation involved in a single loss event. The size of our retention will give a pretty fair indication of what we think will be the normal loss as influenced by protection and the like.

Q. You use PML then to indicate your judgment as to the degree of risk as well as the number of risks involved? [109]

A. No, sir.

Q. What do you have to indicate the quality of the risk aside from the number of risks?

A. To our reinsurers?

Q. Yes.

A. Nothing else. They are given information as to the name of the risk and its occupancy.

Q. How would they get that?

A. By symbols on the report.

Q. As what?

A. The National Board grading, and P means it is protected and U means it is not, and B will indicate brick construction, and so on, and they are all understood by insurance men.

Q. You use those on your daily reports and certificates?

A. Yes, sir.

Q. I notice in this exhibit "3", which council showed you, the copies of the Northwestern reinsurance to the Union, in some of the cases you give PML 50%, and where you gave it 50% you say that indicates two risks?

A. Yes, sir.

Q. And when you give it 30% PML that is three?

A. Less than three—pardon me, more than three risks.

(Testimony of John J. Beall.)

Q. Where you say 30%

A. Yes, sir. If it was just three it would be 33-1/3.

Q. And you say 11%?

A. You would have to do a little quick mental arithmetic. It means 11% of the values are involved in the same fire area.

Q. It means a multiplicity of risks?

A. It means the values shall constitute one fire risk. That is on a fire risk there. One risk equals 100% PML.

Q. You do not have such a thing as one and one-half risks, you [110] would have one, two, three?

A. You might have two risks entirely separate, with 66-2/3 of your valuation in one and 33-1/3 in the other.

Q. Did you make the estimate as to the two risks on the Tacoma Narrows bridge?

A. No, sir, not personally. I participated in the discussion.

Q. And what was your segregation as to the two risks as your company found them in the bridge?

A. Not having actually worked out the PML I cannot answer specifically, but I know we considered that the approaches were quite a separate factor from the roadway and the piers were separate from the roadway.

Q. That is as definite as you can make it?

A. Yes, sir. It is not necessary there be a break of contact to make a separate risk.

(Testimony of John J. Beall.)

Q. I am asking what your company's definition of each of those two risks was. Did your company at any time prior to the time of the loss of the Tacoma Narrows bridge give the Union any statement other than the PML you referred to of 50% as to the two risks and defining those risks?

A. That is always the way you give that information.

Q. In other words you do not give it at all but by the PML? A. That is right.

Q. Now one of the major purposes of a net retention in a reinsurance treaty is to give a guarantee to the reinsuring company that the reinsured company, by reason of having a stake in the insurance, will use diligence in placing it?

A. Yes, sir.

Q. And in investigating and adjusting losses?

A. Yes, sir.

Q. And that is important from the reinsurer's standpoint? [111] A. Yes, sir.

Q. In the case of a reinsurance treaty such as is involved here the provision the reinsured shall not cede to the reinsurer more than the amount it retains net, and so forth—you recall that—it is important to the reinsurer in such a treaty to have the assurance that amount is retained, is it not?

A. Yes, sir.

Q. Would it make any difference—I will put it another way—assuming that the situation was reversed in this case; that the \$50,000 of reinsurance had been ceded by the Union to the Northwestern,

(Testimony of John J. Beall.)

and the Union had told the Northwestern it would retain the \$50,000—reversing the parties in the same contract—would not your company have been concerned if it found out subsequently to the cession that although the Union had represented it was retaining \$50,000 net that it had, without your previous knowledge, an excess catastrophe loss policy by virtue of which its top liability on the total loss of the bridge from a single catastrophe was say \$5,000, would you be concerned with that?

A. No, sir. I am certain every company that cedes us reinsurance has a catastrophe contract which may reduce its loss.

Q. Assuming a total loss on the Tacoma Narrows bridge and the Northwestern being the reinsurer, the Northwestern would have to pay \$50,000 in the case of a total loss in one catastrophe, and on the assumed facts I have given you the Union, by reason of the \$5,000 excess catastrophe policy, would only have to pay \$5,000, would not that concern you?

A. Yes, sir; it would. We could not treat that as catastrophe reinsurance—an excess of \$5,000.

Q. You would not? A. No. [112]

Q. I am asking you if it would be possible for a company to secure catastrophe excess loss policies that would say the reinsuring company would assume all liability over a first loss of \$5,000—that would be possible? A. As a possibility?

Q. Yes. A. That would be a possibility.

Q. I am asking you to assume in this case that

(Testimony of John J. Beall.)

you have made a cession of \$50,000 to the Union and the Union instead of retaining the \$50,000 would reinsure on everything over \$5,000 and on a total loss the Union would pay \$5,000 and you would pay \$50,000?

A. If they had shown me they were carrying \$50,000 on the PML?

Q. We will assume the same as you had.

A. 50% PML, meaning they had \$25,000 net on each risk but actually they did not have \$25,000 on each risk.

Q. I am assuming the same thing.

A. Except you brought in the \$5,000.

Q. And that \$5,000 maximum would result as \$32,000 does here from an excess catastrophe reinsurance, and you would be concerned with that difference between your \$50,000 and the Northwestern's \$5,000 loss on the bridge?

A. If it was down to \$5,000 I would be.

Q. Why?

A. Because \$5,000 is lower than the net retention carried by the Union. I would assume they had probably cut their retention on that risk.

Q. As a matter of fact then you would consider in such a case that where there was a representation that there was \$50,000 net retention that a non-disclosure of such excess catastrophe reinsurance would be a matter of concern to you? [113]

A. Of such catastrophe reinsurance.

Q. Is that only a difference in degree from the case that exists here?

(Testimony of John J. Beall.)

A. I cannot answer that without going into something that seems not to be in the case, and that is the practice of reducing lines below an average. If they were carrying an excess of \$5,000 as compared to all the business I would know about it before we accepted pro rata reinsurance.

Q. In the assumed case I have given you where the Northwestern paid \$50,000 and the Union paid only \$5,000 would not your real objection be because your insurance was ten times their reinsurance?

A. There would be a distinction between an objection and a failure to pay.

Q. I asked you if you discovered prior to the loss in the event of a total loss in one catastrophe you would have to pay ten times what your reinsured would have to pay you would feel considerably concerned?

A. Yes, sir.

Q. And it would make a lot of difference?

A. Yes, sir.

Q. I hand you for examination a document marked Defendant's Exhibit "A-10", and I will ask you if that is not a photostatic copy of a letter written by you to Mr. Legris on or about April 13, 1942?

A. Yes, sir.

Q. And is that not in response to another letter which I hand you, a photostatic copy of it, marked Defendant's Exhibit "A-11", from the Union to yourself?

A. Yes, sir.

Thereupon Defendant's Exhibit "A-10" and De-

(Testimony of John J. Beall.)

fendant's [114] Exhibit "A-11" were admitted in evidence. These exhibits were as follows:

DEFENDANT'S EXHIBIT "A-10:"

April 13, 1942.

Mr. J. M. Legris, Assistant Secretary
Union Mutual Fire Insurance Company
Grosvener Building
Providence, Rhode Island

Dear Mr. Legris:

I have only just returned to Seattle from a trip to Chicago to attend a specially called meeting of the Federation, and I find our copy of your circular release addressed "To Our Pro-Rata Reinsuring Companies."

Now I want to confer with my associates before giving you our decision. Frankly, I am much concerned about your new Excess of Loss Contract. It was my understanding that you formerly carried Excess of Loss or Spread Loss above the first retention of \$15,000.

I am sure that we have in force many lines of reinsurance where our liability substantially exceeds \$4,800. I am not happy about the possibility that we may be called upon to pay a loss of three or four times the net loss to your company. I will write you our decision in a short time.

Very truly yours,

(Signed) J. J. BEALL

Executive Vice President

DEFENDANT'S EXHIBIT "A-11":

April 1, 1942

To our Pro-Rata Reinsuring Companies:

Gentlemen:

As of today, April 1, 1942, our company has accepted the operation of a new excess of loss reinsurance contract whereby on some business outstanding, our net retention shall necessarily be different than entered on daily records corresponding, and also on certificates to your company upon pro-rata reinsurances ceded.

Briefly, our new excess of loss reinsurance contract provides for a set minimum net loss retention by the Union of \$4,800 each and every loss occurrence (not each and every risk), with an additional 10% loss possibility upon the provisional amount of excess of loss reinsurance.

Our outstanding pro-rata insurances with your company should not generally be affected by above new Excess of Loss reinsurance set up; however, we shall appreciate and thank you for your agreement to such set up, by your endorsement of one of the two copies of the enclosed amendment for attachment to reinsurance agreement affected thereby.

Very truly yours,

UNION MUTUAL FIRE INSURANCE COMPANY

By

Assistant Secretary. [116]

Memo—Letter on verso with amendment like attached, sent to the following on April 1, 1942:

By Air Mail	By Regular Mail
Northwestern (2 General 2 Canadian)	Stuyvesant
Employers Mutual	Berkshire
American Merchants	Skandinavia
Hardware Dealers	National F & M
Central Manufacturers	Rhode Island
Minnesota Implement	Merrimack
Mill Owners	Lumber Mutual
Minnesota Farmers	Pennsylvania Lumbermens
Midwestern	International
Implement Dealers	Holyoke
Cream City	Fitchburg
Atlas	United
Citizens Fund	Allied American
National Retailers	Towers, Perrin
Michigan Millers	Federal
Lumbermens	General Security
Indiana Lumbermens	1 Cedar St., N. Y. C.
Grain Dealers	Eagle—5—3 Foil
Western Millers	2 Regular

Amendment to Reinsurance Agreement dated—
between the—
and the Union Mutual Fire Ins. Co., of Providence,
R. I.

It is understood and agreed that, effective April 1, 1942, the Union shall have the right to carry Excess of Loss Reinsurance in respect to its own net retention upon risks written, and that, as regards pro rata reinsurances ceded by the Union prior to April 1, 1942, the advised net retained line of the Union on any one risk [116 a] shall not be considered as being reduced by any amounts recoverable from said Excess of Loss reinsurance.

In Witness Whereof the parties hereto have
signed this amendment

On April 1, 1942, on behalf of

UNION MUTUAL FIRE IN-
SURANCE COMPANY

by

Vice President

On April , 1942, on behalf of

by—

The Court: The defendant reserves the right to
produce further testimony to be presented on the
amendment to the amended Complaint?

Mr. Dumett: That is, right, Your Honor.

Upon April 20, 1943, the trial was resumed,
whereupon the depositions of John D. Pryce, Frank
H. Newman, Edwin Stewart and Walter J. Thomp-
son were published and read. Mr. Dumett stated
that these depositions were offered without waiving
previous objections of the Defendant to the ma-
teriality of any evidence regarding custom and
usage.

In proceeding now with its rebuttal testimony,
the Defendant presents in evidence without waiv-
ing the objection heretofore made during the pre-
vious portion of the trial to the introduction of any
evidence bearing on custom or usage, and still re-
lies upon that objection, and submits this evidence
still reserving that objection. [116b] These deposi-
tions as read were as follows:

DEPOSITIONS

of

JOHN D. PRYCE,
FRANK H. NEWMAN,
EDWIN STEWART, and
WALTER J. THOMPSON,

witnesses called in behalf of the defendant, taken on the 3rd day of March, 1943, and continued on the 4th day of March, 1943, before Mr. Nathaniel Braun, Notary Public in and for the County of New York, State of New York, at No. 27 William Street (Suite 1002), in the Borough of Manhattan, City, County and State of New York, pursuant to the Order of Hon. John C. Bowen, Judge of the United States District Court herein, entered on February 25, 1943.

Appearances:

Messrs. DUNCAN & MOUNT,

representing the defendant,

by Arthur C. Muller, Jr., of counsel.

Messrs. SHANK, BELT, RODE & COOK,

representing the plaintiff,

by Jo Dudley Cook, Esq., of counsel.

JOHN D. PRYCE,

a witness herein, having been first duly sworn by the Notary, testified as follows:

(Deposition of John D. Pryce.)

Direct Examination

By Mr. Muller: [117]

Q. Will you kindly state your age, residence address and business address?

A. Age 51; residence, 2031 Locust Street, Philadelphia; business address, 12 South 12th Street, Philadelphia.

Q. In what business or occupation are you engaged, Mr. Pryce?

A. Reinsurance, brokerage business.

Q. What firm or firms are you associated with and in what capacity?

A. John D. Pryce & Company, Incorporated, Vice-President; also Towers, Perrin, Forster & Crosby, Inc., director.

Q. Will you kindly state the nature, character and extent of your experience in the insurance business, in general, and in the field of reinsurance, in particular?

A. Since resigning my commission in the English Army in 1920, I have been continuously engaged in the negotiating, handling and placing of insurance.

Q. Did you first start in England or did you first start in the United States?

A. In May, 1920, I started in this business with C. E. Heath & Company, Limited, London Lloyd's brokers of London, England. I remained with them approximately one year and then resumed the reinsurance business in the United States.

(Deposition of John D. Pryce.)

Q. And with whom were you first when you came to the United States?

A. Firstly, with Brown, Crosby & Company, Philadelphia, for approximately fifteen months; next with my own corporation as above in New York City until 1934. Since then in Philadelphia, as above.

Q. And almost entirely in the field of reinsurance, particularly, or in the insurance field, in general?

A. Almost entirely in the reinsurance field.

[118]

Q. Have you at my request examined a photostatic copy of a reinsurance treaty between Northwestern Mutual Fire Association and Union Mutual Fire Insurance Company, dated January 1, 1940, and which is set forth in the amended complaint filed in this action?

A. I have

Q. And have you also at my request examined a photostatic copy of a policy between Northwestern Mutual Fire Association and Underwriting Members at Lloyd's, Policy No. D30477 and designated Plaintiff's Exhibit 1?

A. I have.

Q. As a basis of my questions which follow, I refer to both of those contracts and request that you assume the following facts:

Northwestern in the latter part of June, 1940, executed and delivered to the Washington Toll Bridge Authority in the State of Washington its policy of insurance insuring said authority against loss or damage by various perils therein specified

(Deposition of John D. Pryce.)

upon the Tacoma Narrows Bridge and approaches, but excluding the Administration Building, near the City of Tacoma in the State of Washington, in the sum of \$350,000. Subsequently, and also in the latter part of June, 1940, Northwestern transmitted to Union its Certificate of Reinsurance, or Daily Report, No. 10852, notifying Union that it had ceded \$50,000 of said insurance upon the Tacoma Narrows Bridge to Union, and further notifying Union that Northwestern was retaining "identical \$50,000" and that the "P.M.L." was 50%. Also assume that Northwestern specifically reinsured all but \$50,000 of said \$350,000 of insurance, and also assume that at the time Northwestern made said cession to Union, the Northwestern was reinsured under an existing excess of loss [119] reinsurance policy, No. D-30477, a photostatic copy of which you read, and assuming that Northwestern in making said cession of \$50,000 to Union and in computing and advising Union, in said Certificate of Reinsurance, No. 10852, of Northwestern's net retention considered only specific reinsurance and gave no consideration to the excess of loss reinsurance policy No. D-30477. Will you kindly state what is the meaning in the insurance business of the term amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company as used in the reinsurance treaty of January 1, 1940, between Union and Northwest-

(Deposition of John D. Pryce.)

ern and numbered Article VIII, having in mind the custom and usage of the insurance business?

A. It would be considered as the amount retained net on that property by the Northwestern Mutual after deducting all the amounts recoverable from all reinsurance.

Q. And what do you mean by the term retained net?

A. In my opinion retained net means that amount which the insuring company retains at its own net risk after deducting all reinsurances.

Q. Will you also kindly state and explain, based on the assumed facts, what consideration under the customs and usage of the insurance business should or would be given by the ceding company to an excess of loss policy, such as Exhibit 1, if any, in computing and advising its treaty reinsurer under a treaty provision such as is set forth in Article VIII of the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company?

A. The said company—the ceding company, rather, should consider [120] that its net retained liability is reduced by the coverage afforded by the excess contract to that property.

Q. With respect to the net retention provision of Article VIII of the reinsurance treaty between Union and Northwestern, state whether or not that particular form of net retention provision, or the substance of it, is a uniform provision customarily

(Deposition of John D. Pryce.)

included in all reinsurance treaties, or whether or not under the customs and usage of the insurance business such net retention provisions vary in form, and, if so, how and in what respect and to what extent they vary?

A. The provision is quite usual and customary.

Q. Will you kindly state and explain to what extent, if any, is the custom or usage in the insurance business with respect to the computation and statement of net retention by a reinsured company to its treaty reinsurer dependent upon the particular wording of the net retention provision in the reinsurance treaty?

A. The statement as to net retention made by the ceding company is of the utmost importance to the reinsuring company. The ceding or "originating" company would have all underwriting details of the risk or property involved. The reinsuring company would not have such details, and would therefore rely on the underwriting judgment of the ceding company as to size of a line which could conservatively be retained on a given risk.

Q. In view of the assumed facts, and taking into consideration the provisions of Northwestern's excess of loss policy, Exhibit 1, can you compute the highest possible loss which Northwestern could sustain at its own risk and liability in the event of any one loss involving the Tacoma Narrows Bridge?

A. Their maximum net retained loss would be \$32,000, being a first [121] loss of \$30,000 plus 10% of the remaining \$20,000.

(Deposition of John D. Pryce.)

Q. What is the meaning in the insurance business, in view of the customs and usages of that business, of the term "P.M.L." as used in the Certificate of Reinsurance, or Daily Report, No. 10852, transmitted by Northwestern to Union, and for what purposes is the term "P.M.L." customarily used by reinsured companies in making cessions of reinsurance under reinsurance treaties to their reinsuring companies, and I show you a photostatic copy of the reinsurance certificate No. 10852?

A. The letter "P.M.L." means probable maximum loss. This is a symbol commonly used by an insurance underwriter. It expresses [122] his judgment as to the probable maximum damageability of the risk from the peril insured against. In a cession binder from the insuring company to the company accepting the reinsurance the "P.M.L." estimate, which is usually shown with the letters "P.M.L." followed by a percentage, indicates the ceding company's judgment as to the probable maximum damageability of that risk. The company accepting the cession is guided thereby as to the amount of the cession which it will retain net for its own account and as to how much it should retrocede to other companies.

Q. To what extent, if any, is the term "P.M.L." used to indicate the number of risks involved by reinsured companies in making cessions of reinsurance under reinsurance treaties to their reinsuring companies?

(Deposition of John D. Pryce.)

A. It is not so used at all in my opinion.

Q. Under the customs and usages of the insurance business in what manner, if any, do reinsuring companies indicate the number of risks involved in making cessions of reinsurance under reinsurance treaties to their reinsurers?

A. Usually by making separate cessions for separate risks. In some cases by specifying the number of risks and in such cases usually indicating the largest valued risk in the cession.

Q. State briefly the various types and kind of reinsurance?

A. To my mind the principal types of reinsurances can be divided into two main headings: One being pro rata reinsurance, sometimes called specific reinsurance; the other main class is excess of loss reinsurance. The first class is a plan of sharing an amount of insurance so that the reinsured company and its reinsuring companies share in any loss in the same proportion as their own individual share of the risk. Excess of loss reinsurance is plan by which the reassured assumes a [123] first loss of an agreed figure and the reinsurers are only involved for the amount in excess of the reinsured company's first loss retention.

Q. Now, I ask you in what class would you place treaty reinsurance?

A. Treaty reinsurance would come within class specified number one above.

Q. And retrocession?

A. Also in class number one.

(Deposition of John D. Pryce.)

Q. Will you please state what type or kind of reinsurance is represented by Plaintiff's Exhibit 1, policy No. D-30477?

A. Excess of loss reinsurance.

Mr. Muller: That is all.

Cross Examination

By Mr. Cook:

Q. Mr. Pryce, I understand that your work is that of an insurance broker? A. Yes, sir.

Q. And all of your experience in the insurance business has been that of a broker?

A. Yes, sir; but I have had a great deal of contact with executives of insurance companies.

Q. That is in connection with your brokerage work?

A. More correctly I would say in connection with negotiation of reinsurance contracts.

Q. Just what is the nature of your work in negotiating these reinsurance contracts?

A. The nature of my work is to analyze the reinsurance requirements of an insurance company and to design a contract of reinsurance which will fit those requirements.

Q. Does that apply to both specific reinsurance and excess of loss reinsurance? [124] A. Yes.

Q. Referring only to the specific reinsurance contracts, what experience have you had in the way that one company reports or cedes to another company a certain amount of specific insurance?

A. This is the most elementary type of reinsur-

(Deposition of John D. Pryce.)

ance and any reinsurance broker or advisor necessarily has considerable experience as to the nature and usage of such covers.

Q. I am interested particularly in the mechanics of how a certain amount of specific insurance is ceded to a reinsuring company. Can you explain that?

A. The insuring company, in accordance with the terms and conditions of its reinsurance treaty with another company will cede amounts of insurance and will establish those cessions by sending the reinsuring company a binder with brief details (as called for by the treaty) of the risk concerned. These details are usually confirmed monthly by bordereaus which list the cessions made during the preceding month.

Q. And premiums, of course, are paid on the basis of those bordereaus usually? A. Right.

Q. What experience have you had in the actual mechanics as you have described them of one company ceding specific insurance to another?

A. Considering Lloyd's underwriters as what you call a company, I have handled many such treaties throughout my entire experience.

Q. You speak of treaties, that is, the actual reinsurance treaty that you speak of that you handled?

A. I mean treaties and I have also handled many specific items of reinsurance. [125]

Q. When a company cedes a specific amount of insurance to its reinsuring company what is the

(Deposition of John D. Pryce.)

custom in regard to advising that company of their various excess of loss policies?

A. May I ask do you mean under a treaty or a specific risk which is not covered by a treaty.

Q. Under a treaty.

A. If there is any excess of loss reinsurance covering the risk concerned the ceding company would or should mention that fact. If under a treaty then the treaty should itself state whether or not it is permissible for the ceding company to protect itself by excess of loss reinsurance.

Q. Is that advice given on each daily report ceding specific insurance?

A. Speaking for my office it is unless it is under a treaty where such permission exists.

Q. I am not referring to your office; I am referring to one insurance company dealing under a treaty with another insurance company?

A. I believe it is customary.

Q. Did you ever see such a daily report with that information on it? A. Yes I did.

Q. What company made the report?

A. One of the Reciprocal Exchanges under the management of Ernest W. Brown, Incorporated, New York. I have doubtless seen others but cannot recollect the particular names of the companies.

Q. This report you speak of was made to what reinsuring company?

A. To Lloyd's Underwriters.

Q. Under a specific reinsurance treaty?

(Deposition of John D. Pryce.)

A. Under both a specific treaty and other similar reports for [126]

Q. Is that the only instance you can specifically thing of? A. At the moment, Yes.

Q. How general in the insurance world, Mr. Pryce, is the practice of carrying catastrophe reinsurance or excess of loss reinsurance of the type displayed here by Plaintiff's Exhibit 1?

A. I would say that it is quite general for insurance companies to carry catastrophe reinsurances. It is also quite general for companies to carry excess of loss reinsurances, but excess of loss reinsurances are by no means all catastrophe reinsurances, and if you are referring particularly to Exhibit number 1, I would call this an excess of loss reinsurance but not a catastrophe reinsurance.

Q. What is the distinction which you draw between those two types?

A. A catastrophe reinsurance, in my opinion, is a contract which protects a company against losing a very substantial sum of money in one loss occurrence.

Q. Is that the amount that is covered by Exhibit 1? A. In my opinion, no.

Q. Why not?

A. Because in my opinion a loss of \$30,000 to a company of the size of the Northwestern Mutual would not be a catastrophe nor for that matter would a loss of \$50,000.

Q. That policy Exhibit 1 does not apply to any specific risks, does it? A. No, sir.

(Deposition of John D. Pryce.)

Q. And it does meet the other part of your definition, namely, that it is a loss occasioned by one event or one cause. Is that not true?

A. To that extent it does.

Q. In other words, your loss must occur before you can determine [127] whether or not Plaintiff's Exhibit 1 will be brought into play?

A. I believe that would be true of practically any reinsurance contract.

Q. It is true of that particular contract, Exhibit 1, isn't it? A. Yes, sir.

Q. In other words, before you can determine whether this policy will apply you must first have the loss and know the extent of it and the cause?

A. I would say naturally.

Q. It is different in that respect than a policy covering a specific property, isn't it?

A. No, sir; not in my opinion.

Q. It is not? A. No sir.

Q. Possibly I don't make myself clear. A policy covering a specific property of course insures that specific property against a risk, while this policy, Exhibit 1, insures a company against a loss to all property, assuming the loss is sufficiently large to bring this in play?

A. My answer would be this policy can obviously be involved in a loss on a single risk, and I know of no contract which can properly be called a catastrophe reinsurance contract if it can be involved where one risk only of the reinsured company is damaged or destroyed in the loss occurrence.

(Deposition of John D. Pryce.)

Q. Mr. Pryce, you are familiar, I assume, in a general way at least, with the Tacoma Narrows Bridge loss? A. Generally.

Q. On the Tacoma Narrows Bridge the Northwestern issued a policy for \$350,000 and specifically reinsured all but \$50,000. Now, bearing in mind the existence of Plaintiff's Exhibit 1, assume that the same windstorm destroyed another bridge in the same [128] vicinity upon which the Northwestern had an identical policy and had made identical cessions of specific reinsurance, what would have been the Northwestern's net retention on the Tacoma Bridge? A. Which reinsurance contract?

Mr. Muller: Which one are you referring to?

Q. What would have been the Northwestern's net retention on the Tacoma Bridge?

Mr. Muller: Under what policy?

Mr. Cook: Under the policy they wrote on the Tacoma Bridge.

A. \$32,000.

Q. How did you compute that?

A. I don't quite get the point of your question.

Q. How would you compute the net retention of \$32,000?

A. Because that was the amount which they retained net after deducting all other reinsurance.

Q. All right. What would have been their net retention on the other bridge upon which they carried an identical policy?

A. I think you have to ask such a question in re-

(Deposition of John D. Pryce.)

lation to the term net retention as applied to a particular reinsurance contract.

Q. I have asked you to assume the identical policies, that the identical policies were involved in the second bridge as well as on the Tacoma Narrows Bridge and that both bridges were destroyed by the same event. You say the net retention on the Tacoma Bridge under those circumstances would be \$32,000, and now I ask you what would be the net retention on the other bridge which was destroyed by the same wind?

A. For purposes of expressing the net retention to their specific reinsurers their net retention on the other bridge [129] would also be \$32,000.

Q. Yet they would not have paid \$32,000 on that assumed state of facts on the loss, would they?

A. Do you mean because of their excess loss contract?

Q. Yes, sir.

A. I would say it would not be possible to specify as to which bridge they paid a net loss of \$32,000.

Q. I think that is probably correct. How much on that assumed state of facts would the Northwestern actually pay on both bridges?

Mr. Muller: Assuming a total loss?

Mr. Cook: Yes, sir.

A. Do you mean how much would they pay or how much would the net cost to them be?

Q. What would their net loss be?

A. Under this Lloyd's contract, under Exhibit 1, it would be \$32,000.

(Deposition of John D. Pryce.)

Q. That would be a total net loss to the Northwestern of \$32,000 on both bridges? A. Yes.

Q. And as you say it would be impossible to say on which particular bridge the \$32,000 was to be paid? A. Yes.

Q. Does it not follow then, Mr. Pryce, that under your definition it would be impossible to know what a company's net retention was until after a loss was incurred if you take into consideration this Lloyd's excess policy, Plaintiff's Exhibit 1?

A. I agree and that is why I do not consider this policy as a catastrophe cover.

Q. Regardless of what you considered under this Exhibit 1, do you agree that the net retention of the Northwestern cannot be de- [130] termined until after a loss has occurred?

A. I do not. I would say their net loss cannot be determined until after the loss has occurred.

Q. Can you then tell me on that assumed state of facts what their net retention on each of those two bridges would be?

A. I would say that their net retention on each of those bridges subject to excess of loss reinsurance was \$50,000 on each bridge.

Q. The net retention you say would be \$50,000 subject to this excess contract. Is that correct?

A. Yes.

Q. And in ceding specific reinsurance under those conditions they should advise the reinsuring company that their net retention was \$50,000 subject to this excess policy, Plaintiff's Exhibit 1?

(Deposition of John D. Pryce.)

A. Right. If they had said that there could be no question as to the propriety of this particular cession.

Q. In other words, referring to the telegram of June 10, 1940, from Northwestern to Union, which is Exhibit either A-1 or A-2, wherein the Northwestern advised "we will retain \$50,000," if I understand your position correctly, that cession would be perfectly proper and in accordance with the insurance practice if they had gone on and said "subject to excess policy with Lloyd's," referred to in this record as Exhibit 1?

A. I would say that if Northwestern had stated in their telegram that they would retain \$50,000 subject to excess of loss reinsurance, and that if Union Mutual had agreed to accept \$50,000 on that basis, then the matter would have been entirely in order.

Q. That, of course, raises the question of what knowledge the Union Mutual had of the existence of this policy, Exhibit 1. Is that not right? [131]

A. If the Union Mutual were not aware of the excess reinsurance which the Northwestern had, they would have asked at that juncture.

Q. In other words, if the Union Mutual knew that the Northwestern carried the policy referred to as Exhibit 1, then of course it would have been an idle gesture to advise them of that fact again?

Mr. Muller: I assume in connection with the treaty.

Mr. Cook: Yes.

(Deposition of John D. Pryce.)

A. If the Union Mutual had been aware of the exact coverage afforded by the excess treaty and had previously agreed that cessions were acceptable with the protection of that excess, I still think Northwestern to be on the safe side should have mentioned this excess treaty when requesting permission to cede \$50,000 on the Tacoma Bridge. Furthermore, I think the treaty between Northwestern and the Union Mutual should have contained a clause permitting the existence of the excess. This is a general precaution in all contracts I have arranged.

Q. I don't believe you have yet answered my question specifically, Mr. Pryce, and that is, referring to this telegram above identified, if the Union Mutual knew of the existence of Plaintiff's Exhibit 1, then the words, "we will retain \$50,000," would to them have meant \$50,000 retention subject to Plaintiff's Exhibit 1, would it not?

A. I would not be too sure of that.

Q. Going back to a previous question, in which we agreed that it is practically a universal practice for insurance companies to carry excess reinsurance in some form or another?

A. It is very general.

Q. Do you know of any company that does not carry some type of excess coverage? [132]

A. Not offhand.

Q. It is recognized, is it not, in the insurance world that all companies do carry some type of excess coverage?

(Deposition of John D. Pryce.)

A. The majority do.

Q. That is one indication of good management on the part of an insurance company, would you so state?

A. Good and conservative management.

Q. You are familiar, of course, with Best's Reports, are you not? A. Yes.

Q. That is an accepted book in the insurance world? A. I believe so.

Q. Used quite universally, is it not?

A. I would say so.

Q. And in that book the various types of excess coverages carried by the different insurance companies are described?

A. In some cases.

Q. You don't know, I assume, whether the excess coverages as carried by the Northwestern were described in Best's Reports? A. Probably.

Q. Do you make any distinction, Mr. Pryce, between net loss and net retention?

A. They are two entirely different things. The net retention usually refers to a risk, whereas a net loss indicates the net loss of an insurer.

Q. The reason I ask that was to ask this: Isn't it a fact that this Lloyd's policy, Exhibit 1, affects the net loss of the company rather than its net retention on a specific piece or property?

A. I would say that if the Northwestern's net retention on a risk is more than \$30,000 it is obvious that this excess policy could be involved in a loss on one risk alone. [133]

(Deposition of John D. Pryce.)

Q. Well, you possibly don't follow me, but in the insurance world, and I am speaking of the meanings of these terms, is it a fact that excess coverages do not affect what is known as net retention but do affect what may be the ultimate net loss which the company may sustain?

A. I would say that as regards the excess of loss reinsurers one is concerned with the ultimate net loss of the reassured, but as regards the treaty reinsurers one is concerned with the net retention of the reassured.

Mr. Cook: That is all.

Redirect Examination

By Mr. Muller:

Q. When Mr. Cook asked you whether the excess of loss did not affect the net retention, did not the answer to that question depend upon the limits retained net by the Northwestern? In other words, the application depends upon the attachment point of the excess of loss coverage as to whether it would affect the retained line?

A. That is correct.

Q. So that when Northwestern retained net \$50,000, that retention would not have been affected by their excess catastrophe policy, except that the attachment point was within that net retention, namely, 90 per cent excess of \$30,000?

A. Yes.

Q. Is it usual for a catastrophe policy to be written which would affect the normal retained net

(Deposition of John D. Pryce.)

lines of the originating company on any one risk?

A. It is unusual and I would not call such a policy a catastrophe policy.

Mr. Muller: That is all.

Mr. Cook: I have nothing further. [134]

FRANK H. NEWMAN,

a witness herein, having been first duly sworn by the Notary, testified as follows:

Direct Examination

By Mr. Muller:

Q. Will you kindly state your age, residence address and business address?

A. Age 51; residence address 104 Tullamore Road, Garden City, New York; business address 1 Cedar Street, New York City.

Q. In what business or occupation are you engaged?

A. Reinsurance, fire and allied lines.

Q. With what firm or firms or companies are you associated and in what capacity?

A. Only one,—as Vice-President of the General Securities Insurance Corporation.

Q. Will you kindly state the nature, character and extent of your experience in the insurance business, in general, and in the field of reinsurance, in particular?

A. Thirty-nine years in the insurance business. In the past thirteen years in reinsurance with my

(Deposition of Frank H. Newman.)

present firm, which prior to August 1, 1941 was known as the General Fire Assurance Company. I was with the Continental Insurance Company for a period of fourteen years, and ten years with the Liverpool, London & Globe Insurance Company; and two years with the National Board of Fire Underwriters as a boy.

Q. Have you at my request examined a photostatic copy of a reinsurance treaty between Northwestern Mutual Fire Association and Union Mutual Fire Insurance Company, dated January 1, 1940, and which was set forth in the amended complaint filed in this action by the Northwestern?

A. Yes, I have.

Q. Have you at my request also examined a photostatic copy of a [135] policy of Northwestern Mutual Fire Association with Underwriters at Lloyd's, known as Plaintiff's Exhibit 1?

A. Yes, I have.

Q. As the basis of the questions to follow, I refer to both of those treaties or contracts and request that you assume the following facts:

Northwestern in the latter part of June, 1940, executed and delivered to the Washington Toll Bridge Authority in the State of Washington its policy of insurance insuring said authority against loss or damage by various perils therein specified upon the Tacoma Narrows Bridge and approaches, but excluding the Administration Building, near the City of Tacoma, in the State of Washington, in the sum of \$350,000. Subsequently, and also in the lat-

(Deposition of Frank H. Newman.)

ter part of June, 1940, Northwestern transmitted to Union its Certificate of Reinsurance or Daily Report, No. 10852, notifying Union that it had ceded \$50,000 of said insurance upon the Tacoma Narrows Bridge to Union, and further notifying Union that Northwestern was retaining "identical \$50,000" and that the "P. M. L." was 50%—

A. Meaning probable maximum loss, I suppose.

Q. Yes. (Continuing) Also assume that Northwestern specifically reinsured all but \$50,000 of said \$350,000 of insurance, and also assume that at the time Northwestern made said cession to Union, the Northwestern was reinsured under an existing excess of loss reinsurance policy, No. D-30477, and assuming that Northwestern in making said cession of \$50,000 to Union and in computing and advising Union, in said Certificate of Reinsurance, No. 10852, of Northwestern's net retention considered only specific reinsurance and gave no consideration to the excess of loss reinsurance policy No. D-30477. Now, will you kindly state what is the meaning in the insurance business of [136] the term amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the said reinsured company with the reinsuring company, as used in the treaty between Northwestern and Union in Article No. VIII thereof, having in mind the usage and customs of the insurance business?

A. To me it means the amount of dollar liabil-

(Deposition of Frank H. Newman.)

ity on a risk after the application of all reinsurance, that is, the amount of money which the ceding company—that is, it means the amount of money which the ceding company would have to pay out of its own pocket if the risk were a total loss.

Q. Will you please state and explain based on the assumed facts what consideration under the customs and usage of the insurance business should or would be given by the ceding company to an excess of loss policy such as Exhibit I in computing and advising its treaty reinsurer under a treaty provision such as is set forth in Article VIII of the treaty between Northwestern and Union?

A. This treaty, if I read it correctly, has nothing to say about excess or catastrophe covers as carried by the Northwestern. So that I, or anyone else, as I see it, would be justified in understanding that the Northwestern carried \$50,000 net without reinsurance as defined in the preceding testimony on the risk, but this was not the case for their catastrophe or excess cover meant that they could not lose in excess of \$30,000 plus 10% of any part falling to the share of the Lloyd's cover.

Q. With respect to the net retention provisions of Article VIII of the reinsurance treaty between Union and Northwestern, state whether or not that particular form of net retention provision, or the substance of it, is a uniform provision [137] customarily included in all reinsurance treaties or whether or not under the customs and usages of the insurance business such net retention provisions vary in

(Deposition of Frank H. Newman.)

form, and, if so, how and in what respect *to* they vary?

A. My answer is yes. Of course, I have seen plenty of treaties which in conjunction with "net retention without reinsurance" grant permission for conflagration covers which shall not affect the defined net retentions on the individual risk, and it must be borne in mind together with the preceding that a catastrophe cover as such is designed to protect the aggregate of a company's nets, and that a real conflagration cover is usually in excess of a very sizeable first loss retention, whereas the first loss retention of \$30,000 in the Lloyd's cover under discussion is quite a low first loss retention for a company the size of the Northwestern. The real catastrophe cover is in excess of a first loss retention high enough so that the individual risk is seldom affected, but, naturally, wherever the ceding company retains dollar liability in excess of the first loss retention as specified in the excess or catastrophe cover, they know that their retention is reduced below the amount retained.

Q. When you used the term "conflagration cover" did you mean catastrophe? A. Yes.

Q. Will you kindly state and explain to what extent, if any, is the custom or usage in the insurance business with respect to computation and statement of net retention by a reinsured company to its treaty reinsurer dependent upon the particular words of the net provision in the reinsurance treaty?

(Deposition of Frank H. Newman.)

A. I would answer that by being specific, that in this treaty there being no statement of conflagration or excess covers [138] carried by the ceding company, that net retention meant as stated in the first part of this testimony—the actual amount of dollar liability which the ceding company would be out of pocket if the risk were a total loss.

Q. Taking into account the assumed facts again, and also taking into consideration the provisions of the Northwestern's excess of loss Policy No. D-30477, can you compute the highest possible loss which the Northwestern could have sustained at its own risk and liability in the event of any one loss involving the Tacoma Narrows Bridge?

A. This is a 90%, isn't it?

Mr. Cook: Yes.

A. (Continuing) \$32,000 being the first loss. Retention of \$30,000, and 10% of the other \$20,000 retained by the Northwestern. [139]

Q. What is the meaning in the insurance business, in view of the customs and usage of the business, of the term "P. M. L." as used in the Certificate of Reinsurance No. 10852 transmitted by Northwestern to Union, and for what purpose is the term "P. M. L." customarily used by reinsured companies in making cessions of reinsurance under reinsurance treaties to their reinsuring companies, and I show you a photostatic copy of the Certificate of Reinsurance referred to?

A. Probable maximum loss means nothing more than the amount subject.

(Deposition of Frank H. Newman.)

Q. What is meant by the amount subject?

A. It is that percentage or dollar part of the net retention which the expected loss should not exceed.

Q. And how is that sum computed? How is the "P. M. L." computed?

A. The amount subject on a risk, or the "P. M. L.", is a matter of underwriting judgment, usually, however, based upon inspection reports.

Q. To what extent, if any, is the term "P. M. L." used to indicate the number of risks involved by reinsured companies in making cessions of reinsurance under reinsurance treaties to their reinsuring companies?

A. I cannot see that "P. M. L." as a term means anything in connection with a number of risks explanatory thereof on the part of the ceding company to the reinsurer.

Q. Under the customs and usages of the insurance business in what manner, if any, do reinsuring companies indicate the number of risks involved in making cessions of reinsurance?

A. Each cession by the ceding company to the reinsurer constitutes a risk unless the ceding company has elected to consider several buildings as constituting one risk, or it might be that what would normally be one risk would be written under [140] two scheduled forms, and the ceding company might or might not indicate to the reinsurer that they had fixed their net retention over the group, but of course the amount ceded would depend upon the net

(Deposition of Frank H. Newman.)

retention as fixed. In this case on a group risk and according to the treaty limitations.

Q. Are there many types of kinds of reinsurance? A. Yes.

Q. Will you kindly mention several of them at this time?

A. Reinsurance, according to my knowledge, falls in two main classifications: Pro-rata reinsurance; and reinsurance arranged on an excess of loss basis.

Q. Is Plaintiff's Exhibit 1, Policy No. D-30477, a type or kind of reinsurance, and, if so, what type or kind of reinsurance?

A. Yes. It is a catastrophe cover or excess of loss cover, whichever term is preferred, on an excess of loss basis against a constant first loss retention by the ceding company where more than one risk or group of risks are involved in the same disaster. It may cover only one risk, especially where the first loss retention is so low.

Mr. Muller: That is all I have.

Cross Examination

By Mr. Cook:

Q. Mr. Newman, your company is now known as the General Securities Assurance Corporation?

A. Yes.

Q. Does that company deal exclusively in reinsurance contracts?

A. Exclusively in reinsurance.

Q. How many contracts of reinsurance do you

(Deposition of Frank H. Newman.)

have in force or does your company have in force?

A. This is not exact,—but in the neighborhood of fifty or more.

Q. And those, I assume, are both specific reinsurance and [141] catastrophe contracts?

A. We do not write any catastrophe.

Q. All specific?

A. All pro-rata or contributing reinsurance.

Q. Pro-rata reinsurance and specific reinsurance means the same thing, doesn't it?

A. Terms become so confused in this business. Pro-rata to me is just the distinction between the work-out of the payment on the part of the reinsuring company as contrasted with the excess of loss arrangement which does not contribute until the first loss retention is exceeded.

Q. The treaty between Northwestern and the Union is what is known as pro-rata reinsurance?

A. Yes.

Q. Are the contracts which your company holds with these fifty odd insurance companies for pro-rata reinsurance similar in nature to the treaty existing between the Northwestern and Union?

A. Yes, there are a great many variations, however.

Q. But they are generally of the same type?

A. Yes. The wording of the clauses may be different.

Q. What investigation do you make of a company prior to the time you enter into a reinsurance treaty?

(Deposition of Frank H. Newman.)

A. We wish to know if it is a stable company, which is generally apparent from an examination of the last statement. We wish to know in what position we are ceding our reinsurance, whether it is a first surplus treaty, and we wish to know very definitely the net retentions, if, as is true in nearly all cases, the capacity which we obligate ourselves to is based upon the net retention.

Q. That is the net retention of the ceding company? [142]

A. Of the ceding company. We particularly wish to see the form and wording of the proposed treaty, which should be prepared for examination by the reinsurer on the part of the ceding company or its broker.

Q. Now, in the investigation you say the net retention of the ceding company is of course very important to you? A. Yes.

Q. Do you in that investigation find out what catastrophe covers such a company carries?

A. We have and we have not. It depends largely upon the company and the treaty wording submitted.

Q. The carrying of some kind or some form of a catastrophe policy is practically universal among insurance companies?

A. It is generally assumed and practically universal.

Q. And it is assumed you started to say I suppose by anyone dealing with another insurance com-

(Deposition of Frank H. Newman.)

pany that they do carry some kind of a catastrophe cover? A. Yes.

Q. That is a matter of common knowledge in the insurance world? A. Yes.

Q. Can you tell me off-hand where the information regarding that kind of catastrophe cover would be available to one trying to determine that question?

A. It might be volunteered by the ceding company or specific questions on this point might be asked by the prospective reinsurer, but it would seem to me, at lease, that the larger the company the more responsibility they should feel of notifying the prospective reinsurer if there is a low first loss retention on any catastrophe or excess cover which would affect the individual nets, and assuming that they intended to quote nets to the ceding company higher than the [143] first loss retention and against which the ceding company might be accepting one or more net lines.

Q. That information is also aavilable in many publications, is it not?

A. I do not think it is authoritative in any publications. Best's, of late years, is giving some detail along these lines, but to be specific that is a question which Best's asks for their book but which there is no obligation upon the company to give in detail and which is not always given in detail or completely.

Q. Do you happen to know what Best's report

(Deposition of Frank H. Newman.)

shows concerning the excess contract, Exhibit 1, carried by the Northwestern Mutual Fire?

A. I didn't read it.

Q. If I should tell you that the details of this specific coverage, Exhibit 1, has been published in Best's for a matter of some fourteen or fifteen years, I believe, would you not say that the fact that they did carry such a policy with those limits would be a matter of general knowledge in the insurance world or to anyone interested in that question?

A. If I had read such detail I would certainly query the company offering the treaty, but this in my mind does not excuse a company offering reinsurance under a treaty from frankly stating where they have a low first loss retention under catastrophe or excess cover.

Q. I don't believe you have answered the question. You have more or less argued what the Northwestern should or should not have done.

A. The answer is it would definitely be a matter of knowledge to anyone interested enough to look it up and read it.

Q. And I assume that if you were negotiating a reinsurance treaty [144] with the Northwestern or with any other company you would undoubtedly refer to Best's for some information about it, wouldn't you?

A. We often do consult Best's.

(Deposition of Frank H. Newman.)

Q. Assuming that you knew of the existence of this catastrophe policy, Exhibit 1, and the Northwestern ceded to you, as evidenced by this Daily Report No. 10852, \$50,000 of coverage on a risk with advice that they retained an identical \$50,000, you would, of course, know that their retention of \$50,000 might be—you would know that the amount of their loss on that amount of \$50,000 might be affected by the existence of this Exhibit 1?

A. Yes, but I would also have asked them to reduce the line to approximately \$30,000 because they were not to cede more than their net retention, but it is broader than this because there is also windstorm cover, and in my mind I would be choosing between asking them to reduce not only to \$30,000 but possibly to \$12,500.

Q. But if you knew all of these facts and did not request the reduction and accepted the \$50,000 ceded, you of course would be liable in that amount in the event of a loss, wouldn't you?

A. Yes, except that this answer is affected by the usual wording in treaties that if the capacity of the treaty limit is exceeded the ceding company is obligated to revise its net according to the limitations in the contract in question. Whether that clause is in this contract or not I would have to see and read it.

Q. Now, as I understood you, Mr. Newman, you said that net retention to you meant the amount of dollars that a company would have to pay if there was a total loss on the risk?

(Deposition of Frank H. Newman.)

A. It would have to pay out of its own pocket after collecting [145] all reinsurance.

Q. In other words, net retention according to your redefinition is that amount of money which the ceding company itself pays in the event of a total loss? A. Not the gross amount.

Q. The net amount that the company itself pays?

A. That is right. I would like to add that net retention to me, and I believe to all American underwriters, means the same thing as the Lloyd's phrase, "ultimate net retention."

Q. You apparently draw no distinction between net retention and net loss? A. No.

Q. There is none in your judgment?

A. They are not analogous. Net retention is the dollar amount retained on a risk which the company is willing to lose net. You will have to come back to your question a minute. I am not sure I get the exact wording. No distinction between what?

Q. Net loss and net retention?

A. (Continuing): Whereas the net loss is merely the amount of loss they are called upon to pay on that net retention.

Q. Very well. Now, under your definition of net retention, and dealing with the specific problem at hand, you say the net retention of the Northwestern on that Tacoma Bridge would be \$32,000?

A. On the understanding that they reinsured

(Deposition of Frank H. Newman.)

outside all except \$50,000. They only wrote \$20,000 against the cover.

Q. That is based on the assumed facts which Mr. Muller stated to you? A. Right.

Q. Now, I want you to assume: we will call the Tacoma Bridge, Bridge A, and the Northwestern had this coverage on it that [146] has been described to you and these other reinsurance treaties were in effect. Assume that ten miles from there was another bridge, which we will call B, upon which the Northwestern had an identical duplicate set of policies. Suppose this same windstorm had blown down and destroyed to a total loss both bridges A and B, what would have been the net retention of the Northwestern on bridge A?

Mr. Muller: Under the Union Mutual policy?

Mr. Cook: Under the form which the reported here.

A. The two bridges in the illustration are one risk in the event of disaster under the catastrophe policy. They are two risks when it comes to passing off pro-rata reinsurance. That seems admitted in the question itself, for the hypothesis is that the Northwestern has a net retention or retained amount of \$50,000 on each bridge. The two contracts, excess of loss and pro-rata reinsurance, have an entirely different application.

Q. My question was what would be the amount of the net retention of the Northwestern under your definition on the first bridge A?

Q. I will have to ask you when you say what

(Deposition of Frank H. Newman.)

would be the net retention,—the net retention to which company? The Lloyd's underwriters or the Union Mutual?

Q. To the Union Mutual.

A. I would understand under the treaty wording that the net retention on each bridge as given to the Union Mutual was \$50,000 by the Northwestern.

Q. On each bridge?

A. Individually. Each bridge individually.

Q. In the event that both bridges were destroyed to a total loss, which I assumed in my question, they would pay only on both bridges \$37,000, wouldn't they? [147]

A. Under the excess of loss contract, that is correct.

Q. Can you segregate any part of that to each individual bridge as net retention?

A. Yes, indeed.

Q. Wouldn't their net retention in that event be only \$18,500 on each bridge? A. No.

Q. How much would it be?

A. \$50,000 so far as the retention quoted to the Union because you cannot compare the workout on a spread loss.

Q. I don't follow you. I thought you said that because of the existence of Exhibit 1 the net retention of the Northwestern was only \$32,000 instead of \$50,000 as they reported?

A. It is with the application of the Lloyd's treaty.

(Deposition of Frank H. Newman.)

Q. In reporting on daily such as this amount retained no consideration is given to a catastrophe policy such as that?

A. It has to be under the wording of this contract.

Q. I am just trying to find out now what they would report as being their net retention on each, bridge A and on bridge B?

A. If what they reported in the case of the Tacoma Bridge is any indication the Northwestern apparently would have reported a retention of \$50,000 on each bridge. What they should have reported net retention as defined in my testimony an amount of \$32,000 on each bridge.

Q. \$32,000 event? A. \$32,000 even.

Q. On each bridge? A. Yes.

Q. But with the same cause destroying both bridges, that would not have been accurate, would it? A. Yes, it certainly would. [148]

Q. Even though they were called upon to pay only a \$37,000 loss on both bridges?

A. It would have been accurate under common usage and interpretation and the fact that pro-rata reinsurance always presupposes a net retention upon each risk, and admittedly there may be a disaster involving more than one risk, and, as already testified, it is generally admitted that companies carry a catastrophe cover for this purpose. What the pro-rata reinsurer must be interested in is the fact that he is following the net

(Deposition of Frank H. Newman.)

retention as mutually agreed between both contracting parties on each individual risk.

Q. It is true, of course, you can't determine whether Lloyd's policy, Exhibit 1, will be brought into play until after a loss has occurred. Isn't that true?

A. It must be assumed that one risk may always be a total loss and if the net retention is quoted in excess of the first loss retention on an excess cover, the pro-rata reinsurer, if he has a one line contract—one net line contract—would then pay more than the ceding company, which is not the purpose of any contract entered into between two contracting parties if all the facts are known and disclosed.

Mr. Cook: Please read the question.

(Whereupon, the last question was read by the reporter, as follows:

“Q. It is true, of course, you can't determine whether Lloyd's policy, Exhibit 1, will be brought into play until after a loss has occurred. Isn't that true?)

The Witness: That by itself is true, but only by itself. It must have no relation.

Q. Assume that all these facts which you have assumed are true, [149] that on the first day of this windstorm, whatever the date was, a 50% loss had been sustained to the bridge, and that the following day another storm came along and destroyed the other 50%. How would the Northwestern have had to pay out of its own pocket?

(Deposition of Frank H. Newman.)

A. Did you say twenty-four hours—one day?

Q. Yes.

A. Did you specify a windstorm or you did not specify the type of disaster?

Q. Well, it is from a different cause. I am not interested in the time but two losses from separate causes.

A. The first loss might be the windstorm loss and the following day the balance might be destroyed by collapse. It is a very hard and general question to ask or answer, but in the illustration used the collapse would have been dependent upon the windstorm.

Q. I don't want the two losses related in any way. Here one day is a loss from cause A up to 50%, and a day or two later is another 50% loss from cause B. Under those two circumstances how much would the Northwestern out of its own pocket have to pay?

A. I know you wish me to answer \$50,000 but to me the problem is more complicated than that.

Q. Is \$50,000 a correct answer or not?

A. Not necessarily, in my opinion, because I believe that the Lloyd's policy might pay.

Q. On what theory?

A. That the bridge had been weakened by the first damage, whatever the cause of the second.

Q. You are assuming that the total loss then was occasioned by one cause really? [150]

(Deposition of Frank H. Newman.)

A. It is very difficult to believe otherwise. When it is stated as 50% in the first loss with the second following the next day.

Q. I have asked you to assume for the purpose of your answer that the second loss was from an entirely different and distinct cause and had no relation whatsoever to the first one. In that event would not the Northwestern have had to pay \$50,000 under their policy?

A. I don't believe they would have to under this Lloyd's policy.

Q. That Lloyd's policy covered damage or loss from a single cause?

A. From many causes, does it not? I just can't admit the hypothesis.

Q. I am asking you to assume it as being true whether it is or not for the purpose of your answer?

A. Well, I feel I have already answered that. I believe Lloyd's policy would pay.

Q. Will you refer to the provision of Lloyd's policy where it covers only damage coming from one cause?

A. (Reading): Quote now—"applies (blank) to all hazards written by the reinsured company." That is what I base my answer upon.

Q. Suppose that the Northwestern had one hundred houses insured against fire and a separate fire destroyed each of those one hundred houses. Certainly, Lloyd's policy would not cover in such a situation as that, would it?

(Deposition of Frank H. Newman.)

A. The answer is no, but the question is not analogous in my mind to the preceding.

Q. Is there any distinction between that situation and having two separate causes at two different times destroy the Tacoma Narrows Bridge?

A. Yes.

Q. Why is there? [151]

A. Because in the first supposition it concerned only one risk whereas in the latter you assumed one hundred houses were involved at different times. They are not all one risk.

Q. Well, let me ask you this: suppose that the Tacoma Narrows Bridge was insured as these facts show and that there were ten separate occurrences doing damage to that bridge wholly unrelated one to the other and each one damaged it to the extent of \$10,000, would the Lloyd's policy come into play under that state of facts? A. No.

Q. It would not. And under that state of facts how much would the Northwestern Mutual have had to pay out of its own pocket?

A. It would have to pay \$5,000, if 10%, but this seems to me beside the point in the major question under review because it must be assumed that a bridge risk may be a total loss, as it was virtually proven in this Tacoma Bridge case.

Q. You said they would have had to pay \$5,000 under the assumption if there were ten losses or five losses of \$10,000 each so far as the Northwestern share is concerned. They would be called upon to pay a total of \$50,000, would they not?

(Deposition of Frank H. Newman.)

A. If there were ten successive losses at different periods and with spacing sufficient to render the Lloyd's contract non-operative, the Northwestern would pay \$5,000 for each 10% damage——

Q. (Interposing): Or a total of \$50,000——

A. (Continuing): ——but the reinsurer is not so much concerned with what the ceding company must pay on a partial loss because the measure of the reinsurer's liability must always be the maximum amount which the reinsurer can lose based upon the multiple of the ceding company's net retention assumed under [152] any contract.

Q. I asked that question merely to see if you would agree with me,—that although you say the true net retention is only \$32,000 there are times and circumstances under which they could be called upon to pay their full \$50,000. Isn't that right?

A. That is true but it is very definitely also true in connection with any catastrophe cover whether it has a high or a low first loss retention, and it is not the main point with which the reinsurer must be concerned.

Q. How is it possible for a company to be called upon to pay more than they retained?

A. In the case of the Northwestern's retention of \$50,000 on the Tacoma Bridge they had a maximum—they had an ultimate loss retention as expressed by Lloyd's of \$32,000 as arranged, but they had a retained liability, not a net retention, of \$50,000. There is a great difference between

(Deposition of Frank H. Newman.)

the two terms "retained liability" and "net retention."

Q. Well, do you now then draw a distinction between net retention and retained liability?

A. In connection with a Lloyd's contract you must because——

Q. (Interposing): Mr. Newman, in your answer to the first question which was asked you when you defined net retention, you said it is the amount of liability retained after the application of all reinsurance, or, in other words, the amount in dollars that the company would have to pay if there was a total loss?

A. That is correct as to net retention, but a pro-rata reinsurer——

Q. (Interposing): Retained liability or retained reinsurance is exactly the same, isn't it——

A. But under the application of an excess cover a writing company may retain, or, in other words, write against the cover or, [153] as is often stated, have a retained liability in excess of their first loss retention and that is inherent in the cover which is a capacity limit beyond the first loss retention.

Q. The ceding company can't have liability to pay money for anything in excess of the amount of insurance it retained, can it?

The Witness: Not in one loss, but there could be a succession of partial losses which would exceed in the aggregate in some given period, say, a year, the amount retained.

EDWIN STEWART,

a witness herein, having been first duly sworn by the Notary, testified as follows:

Direct Examination

By Mr. Muller:

Q. Will you kindly state your full name and age? A. Edwin Stewart; age 45.

Q. And also state your residence address and business address?

A. Rumson Road, Rumson, New Jersey; business address, 99 John Street, New York City.

Q. In what business or occupation are you engaged? A. Reinsurance underwriting.

Q. With what firm or firms are you associated and in what capacity?

A. President of the Excess Management Corporation.

Q. At 99 John Street? A. Yes.

Q. Will you kindly state the nature, character and extent of your experience in the insurance business in general, and in the field of reinsurance in particular?

A. From 1920 to 1934, I was a reinsurance broker; and from 1934 to date, a reinsurance underwriter.

Q. Have you at my request examined a photostatic copy of a treaty [154] between Northwestern Mutual Fire Association and the Union Mutual Fire Insurance Company, dated January 1, 1940, and set forth in full in the amended complaint filed in this case? A. Yes.

(Deposition of Edwin Stewart.)

Q. Have you also examined a photostatic copy of Lloyd's policy No. D-30477, issued to the Northwestern Mutual Fire Association by Underwriting Members of Lloyd's? A. Yes.

Q. As a basis of my questions which follow I refer to both of these contracts and request that you assume the following facts:

Northwestern in the latter part of June, 1940, executed and delivered to the Washington Toll Bridge Authority in the State of Washington its policy of insurance insuring said authority against loss or damage by various perils therein specified upon the Tacoma Narrows Bridge and approaches, but excluding the Administration Building, near the City of Tacoma in the State of Washington, in the sum of \$350,000. Subsequently, and also in the latter part of June, 1940, Northwestern transmitted to Union its Certificate of Reinsurance, or Daily Report, No. 10852, notifying Union that it had ceded \$50,000 of said insurance upon the Tacoma Narrows Bridge to Union, and further notifying Union that Northwestern was retaining "identical \$50,000" and that the "P.M.L." was 50%. Northwestern specifically reinsured all but \$50,000 of said \$350,000 of insurance. Also assume that at the time Northwestern made said cession to Union the Northwestern was reinsured under an existing excess of loss reinsurance policy, No. D-30477, and assume that Northwestern in making said cession of \$50,000 to Union and in computing and advis-

(Deposition of Edwin Stewart.)

ing Union in the Certificate of Reinsurance No. 10852 of Northwestern's [155] net retention considered only specific reinsurance and gave no consideration to the excess of loss policy No. D-30477.

Now, will you kindly state what is the meaning in the insurance business of the term amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the reinsured company with the reinsuring company, as used in the reinsurance treaty of January 1, 1940, between Union and Northwestern in Article VIII, having in mind the customs and usages of the insurance business?

A. You have asked me the usage and intent?

Q. What is the meaning in view of the customs and usages in the insurance world, of the term net retention as set forth in Article VIII of the Union-Northwestern treaty?

A. The words "net retention" mean that amount of liability assumed by the company and not shared or protected in any way by any other carrier.

Q. Will you also please state and explain, based on the assumed facts, what consideration should or would be given by the ceding company to an excess of loss policy, such as Exhibit 1, Policy No. D-30477, in computing and advising its treaty reinsurer under a treaty provision as set forth in Article VIII of the amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property reinsured by the reinsured company with the reinsuring company?

(Deposition of Edwin Stewart.)

A. The usual custom is that it is noted in the reinsurance treaty that the ceding company carries an excess cover to protect that amount of liability it retains and it is further noted that that cover shall be disregarded in the company setting up its net retention.

Q. With respect to the net retention provision of Article VIII of [156] the reinsurance treaty between Northwestern and Union, state whether or not that particular form of net retention provision or the substance of it is a uniform provision customarily included in all reinsurance treaties or whether or not under the customs and usages of the insurance business such net retention provisions vary in form, and, if so, how and in what respect and to what extent they vary?

A. I would say that this is a customary provision if there are no agreements between the two companies as to what shall constitute the net retention. Many times when a parent company will include its subsidiary companies in its net retention, that might be called the office line, but that should be noted in a treaty; otherwise without any special notations this states that the company will retain net without any coverage whatever.

Q. Is the custom and usage in the insurance business with respect to the computation and statement of net retention by a reinsured company to its treaty reinsurer dependent upon the particular wording of the net retention provision in the reinsurance treaty?

(Deposition of Edwin Stewart.)

A. Can that question be put in other language?

Q. In view of the assumed facts and taking into consideration the provisions of Northwestern's excess of loss policy, that is Exhibit 1, can you compute the highest possible loss which Northwestern could sustain at its own risk and liability in the event of any one loss involving the Tacoma Narrows Bridge? A. \$32,000.

Q. What is the meaning in the insurance business, in view of the customs and usages of that business, of the term "P.M.L." as used in the Certificate of Reinsurance No. 10852 transmitted by Northwestern to Union, and for what purpose is the term "P.M.L." [157] customarily used by a reinsured company in making cessions of reinsurance under reinsurance treaties to their reinsuring companies?

A. The initials "P.M.L." mean probable maximum loss. In this case it says 50% P.M.L., meaning—which means that the underwriter of the Northwestern considered this Tacoma Bridge policy in which they ceded \$50,000 a 50% probable loss—probable maximum loss—and applying that to the cession he is telling the Union underwriter that the probable maximum loss under this cession would be \$25,000. The reason that this is noted on a cession is to give the reinsurer an idea of the risk so that if he desires to lay some of the cession off he can do so.

Q. To what extent, if any, is the term "P.M.L." used to indicate the number of risks involved?

A. None whatsoever.

(Deposition of Edwin Stewart.)

Q. Under the customs and usages of the insurance business in what manner, if any, do the reinsuring companies indicate the number of risks involved in making cessions of reinsurance?

A. They show it on the cession report—each risk. If there is more than one risk under the one cession they will list the number of risks.

Q. Will you describe the various types and kinds of reinsurance, briefly?

A. Well, there is what we call facultative or street reinsurance, where a company will reduce its liability by giving a portion—by placing a portion of a single risk with another company by way of reinsurance.

Q. Is that also called specific and pro-rata reinsurance?

A. Specific, yes. It is on a pro-rata basis; it is not excess of loss. Then there is surplus treaty reinsurance, which is usually obligatory on the part of the accepting company, [158] and obligatory as to when a cession shall be ceded on the part of the ceding company, and that is on a participating or pro-rata basis. Then there is excess of loss coverage, which can be excess of line or excess of a given amount in one loss or a series of losses arising out of one event. And then there are so-called conflagration or catastrophe covers which are on an excess basis.

Q. Excess of loss basis?

A. Yes, excess of loss basis, over a very large retention usually because the company that buys it

(Deposition of Edwin Stewart.)

is only seeking protection in the event of a conflagration or a hurricane, such as the 1938 hurricane,—a major catastrophe.

Q. Now, I refer to Policy D-30477 and ask you what kind or type of reinsurance you would consider that?

A. I would call this an excess of loss cover.
[159]

Mr. Muller: That is all.

Cross Examination

By Mr. Cook:

Q. Mr. Stewart, what is the nature of the business of the Excess Management Corporation?

A. They are underwriting managers of a group of thirteen insurance companies that participate in the assumption of liability on a participating basis and an excess of loss basis for direct writing insurance companies.

Q. In other words, it is not an insurance company itself but merely is the underwriting manager of these other thirteen companies? A. Yes.

Q. In your duties connected with the company do you have any direct connection with the cessions of reinsurance from reinsuring companies?

A. Yes. All treaties are made in our office, signed by us in behalf of the companies, and all cessions under the treaties are made to our office and bordereaured in our office.

Q. So you negotiate the treaties in the first instance and then the cessions or daily reports, what-

(Deposition of Edwin Stewart.)

ever you call them, actually come through your office on each session?

A. Yes, and are underwritten by the underwriters in our office.

Q. You defined net retention as being the amount of liability assumed by the company, by the ceding company, and not protected by any other carrier? A. Yes. [160]

Q. Isn't it true, Mr. Stewart, that on the assumed state of facts, here, and considering the existence of Lloyd's policy that we have referred to, you cannot compute the amount of liability which the Northwestern would have on their \$50,000 retained insurance until after a loss has occurred?

A. You say you cannot compute the liability?

Q. Yes. Until after your loss has taken place?

A. I think you are wrong because this policy, Lloyd's policy sets forth that—may I read the policy again.

Q. Certainly.

A. The intent of this Lloyd's policy is to protect the Northwestern for 90% of the liability in excess of \$30,000, and in the usage and custom of the reinsurance industry the \$30,000 mentioned in this Lloyd's policy plus the 10% interest in the loss in excess of \$30,000, is considered the net retention of the company.

Q. That, of course, applies only when you are speaking of one loss?

A. No. Or a series of losses arising out of one event.

(Deposition of Edwin Stewart.)

Q. Yes, out of one event. However, with a series of losses from different events the liability of the Northwestern would be in excess of your stated figure of \$32,000?

A. But you cannot have a series of losses from different events.

Q. Why not?

A. The meaning of one loss or series of losses means that one risk may be involved or several risks may be involved in the same event, such as, a tornado or a sweeping fire.

Q. I think I understand that. I probably, unfortunately, used the wrong expression when I said a series of losses. What I should say is separate losses from separate causes, then the liability of the Northwestern could be the full \$50,000 retained?

[161]

A. No. In each case it would be \$30,000 plus their 10% interest in each event you referred to.

Q. The amount of money which they would pay out on those losses would be \$50,000?

A. Before collecting from the Lloyd's policy do you mean? Do you mean before collecting from the Lloyd's policy?

Q. If each loss was under \$30,000 the Lloyd's policy would never come into play, would it?

A. If their loss or losses in each event was less than \$30,000.

Q. That is what I mean to say.

A. It would not come into play.

Q. And assuming that state of facts the amount

(Deposition of Edwin Stewart.)

of money which they would have to pay out could be their full \$50,000 retained?

Mr. Muller: In any one loss?

Mr. Cook: No, I am just speaking of this group of losses.

A. Are you referring to a group of losses happening at different times to one risk?

Q. That is right. A. That is correct.

Q. So when we speak of the amount of liability, referring now to your definition, assumed by the company it could conceivably in this case be up to the full \$50,000 under this policy or under this \$50,000 retention?

A. Do you mean under the example which you have just given?

Q. Yes.

A. Under the example there could be separate losses whereby Northwestern could lose \$50,000 net.

Q. Now, you stated, as I recall it, that the customary way of doing business between a ceding company and its reinsurer was to note in the treaty the existence of excess of loss coverage, such as this Lloyd's policy, and then to disregard the existence [162] of it in reporting the net retention. Did I understand you correctly?

A. Yes. The custom as to set forth in the treaty a definition of net retention—the words “net retention” referred to in the treaty—and in that definition it is acknowledged by the accepting company that for the purposes of the treaty the net retention shall be that portion of the risk retained

(Deposition of Edwin Stewart.)

net by the ceding company un-reinsured in any way except by an excess of loss cover and that for the purpose of ceding the net retention under the treaty the excess of loss coverage shall be disregarded.

Q. In other words, going back to these two treaties here, I assume that had it been stated in the treaty between Northwestern and Union that the Northwestern carried this Lloyd's policy, then the method here of reporting the net retention would be the accepted and correct way of doing it?

A. Do you mean this cession advice?

Q. Yes.

A. That is right, and I think it would—it might have affected materially the Union's acceptance of one line. As I recall, it does in this treaty—an identical line with the Northwestern—and probably they would not have accepted this specific line which was over and above the amount that they could cede under the treaty, but this is only an assumption; I don't know either company.

Q. It really comes down simply to this, doesn't it, Mr. Stewart, that it depends entirely upon what knowledge the Union may have had of the existence of this policy, of Lloyd's, Exhibit 1?

A. Not technically. Technically, because it was not in the treaty—acknowledged in the treaty that this excess of loss policy was in existence, I think that the net retention of the [163] Northwestern was not as stated in the cession advice.

Q. But from a practical standpoint, and so far as any affect it might have on the Union's accept-

(Deposition of Edwin Stewart.)

ing that amount, if they knew of the existence of that Lloyd's policy, Exhibit 1, that was all they were entitled to know?

A. No. I think it might have influenced their acceptance.

Q. Not if they knew it and still accepted the amount ceded? A. Not if they knew it.

Q. If they knew of the existence of Exhibit 1 and still accepted the amount ceded, the form of reporting of course was very unimportant?

A. If they knew it and still accepted the \$50,000, yes.

Q. Of course it is a universal practice for all insurance companies to carry some form of excess of loss coverage? A. I wish it were.

Q. That is not the fact? A. No.

Q. How general is the practice of carrying some form of excess of loss coverage?

A. Well, I could answer—would you like to have me answer that percentagewise as to all companies?

Q. If you can. I don't expect you to be exact. I am interested in knowing in a general way.

A. I would assume that over 50 per cent of the companies carry excess of loss similar to this Lloyd's policy.

Q. You injected a rather new element when you confined it to excess of loss similar to Exhibit 1. My thought was and the question was that they carried some form of excess of loss coverage?

A. I still think not over 50 per cent of the insurance companies.

(Deposition of Edwin Stewart.)

Mr. Cook: I think that is all. [164]

Redirect Examination

By Mr. Muller:

Q. Based on an answer you gave when considering separate and distinct losses, wherein the over-all payments to be made by Northwestern I understood you to say might amount to 50 per cent, did you mean net any one loss?

A. I don't think I said 50 per cent. I think I said might amount to \$50,000.

Q. \$50,000 net? A. Yes.

Q. You didn't mean net any one loss?

A. The total.

Q. The total? A. Yes.

Q. In other words, you did not mean to convey the idea that Northwestern might sustain a net loss of \$50,000 in any one of those individual and distinct losses without application of the Lloyd's treaty? A. No.

Q. Now, may I ask you in reference to the usage and customs of mentioning excess of loss treaties when referring to net retention as permission being granted to carry excess of loss without affecting the net retention, and I show you two clauses and ask you whether or not they are customary clauses covering the statement as you have already testified to? You might read them.

A. (Witness reading) "The net retained line of the reassured on any one risk shall not be considered as being reduced by any amounts recover-

(Deposition of Edwin Stewart.)

able from excess of loss reinsurance.” That is one clause. The other reads: “The net retained line of the reassured on any one risk shall be considered to be an amount [165] equal to the ultimate net loss (after deducting amounts due from excess of loss and other reinsurances) that the reassured could sustain if the loss on such risk were total and no other risk was involved in the same occurrence.”

Mr. Muller: Now please read the question.

(Whereupon the last question was read by the reporter as follows:

“Q. Now, may I ask you in reference to the usage and customs of mentioning excess of loss treaties when referring to net retention as permission being granted to carry excess of loss without affecting the net retention, and I show you two clauses and ask you whether or not they are customary clauses covering the statement as you have already testified to?”)

A. As to the first clause I read this is a customary clause. As to the second clause I read I do not think it is as customary but it sets forth clearly what the net retention shall be. Does that answer your question?

Q. And granted permission in respect to an excess of loss cover?

A. The second clause sets the net retention after deducting the amounts due from excess of loss.

Mr. Muller: I have nothing further.

Mr. Cook: I have nothing further.

WALTER J. THOMPSON,

a witness herein, having been first duly sworn by the Notary, testified as follows:

Direct Examination

By Mr. Muller:

Q. Will you kindly state your full name and age? A. Walter J. Thompson; age 53.

Q. Will you state your residence address and business address? [166]

A. Residence, 1301 Findlay Avenue, New York City; business, 41 Wall Street.

Q. In what business are you engaged?

A. Insurance business.

Q. With what firm or company are you associated and in what capacity?

A. Atlantic Mutual Insurance Company, as Secretary; and Centennial Insurance Company, as Secretary.

Q. Will you please state the nature, character and extent of your experience in the insurance business, and in the field of reinsurance, in particular?

A. I have been employed by the Atlantic Mutual Insurance Company thirty-six years. Part of that time has been in connection with loss and adjustments; first, underwriting loss adjustment and then in charge of reinsurance in the capacity of Secretary.

Q. How many years have you been in charge of the reinsurance feature of the business?

A. I would say about ten or eleven years in reinsurance placing.

(Deposition of Walter J. Thompson.)

Q. Have you at my request examined a copy of a treaty between Northwestern Mutual Fire Association and the Union Mutual Fire Insurance Company, dated January 1, 1940, and which is set forth in full in the amended complaint in this case?

A. Yes.

Q. And have you also examined a photostatic copy of Lloyd's Policy D-30477 between Northwestern Mutual Fire Association and Underwriting Members of Lloyd's?

A. Yes.

Q. As a basis of the questions to follow I refer to both of those contracts and ask that you assume the following facts:

Northwestern in the latter part of June, 1940, executed [167] and delivered to the Washington Toll Bridge Authority in the State of Washington its policy of insurance insuring said authority against loss or damage by various perils therein specified upon the Tacoma Narrows Bridge and approaches, but excluding the Administration Building, near the City of Tacoma in the State of Washington, in the sum of \$350,000. Subsequently, and also in the latter part of June, 1940, Northwestern transmitted to Union its Certificate of Reinsurance, or Daily Report, No. 10852, notifying Union that it had ceded \$50,000 of said insurance upon the Tacoma Narrows Bridge to Union, and further notifying Union that Northwestern was retaining "identical \$50,000" and that the "P.M.L." was 50%. Northwestern specifically reinsured all

(Deposition of Walter J. Thompson.)

but \$50,000 of said \$350,000 of insurance. Also assume that at the time Northwestern made said cession to Union the Northwestern was reinsured under an existing excess of loss reinsurance policy No. D-30477, and also assume that Northwestern in making said cession of \$50,000 to Union and in computing and advising Union, in said Certificate of Reinsurance No. 10852, of Northwestern's net retention considered only specific reinsurance and gave no consideration to the above mentioned excess of loss reinsurance policy.

Now, will you kindly state what is the meaning in the insurance business of the term retained net without reinsurance by the reinsured company at its own cost and liability, such as is set forth in Article VIII of the treaty between Union and Northwestern, having in mind the custom and usage of the insurance business?

A. It would mean that the reinsurer under this treaty would not have a liability for loss greater than the ceding company is willing to bear on the same risk after taking into consideration all reinsurance including excess of loss reinsurance which [168] would apply on one risk. Now, I just like to qualify that by saying that if the ceding company's loss on any one risk or any particular risk were reduced by the pro-rata application over several risks or any number of risks on a recovery made by them under a catastrophe cover, such reduction would not constitute a violation of their retention. It would be assumed that the excess point in any ca-

(Deposition of Walter J. Thompson.)

tastrophe—in any such catastrophe cover would be as great as or greater than the retention of the company on that particular risk or on any one risk.

Q. Based on the assumed facts will you also kindly state what consideration under the customs and usages of the insurance business should or would be given by the ceding company to an excess of loss policy, such as Exhibit 1, Policy D-30477, in computing and advising its treaty reinsurer wherein the treaty provision is such as set forth in Article VIII as to the amount of retained net without reinsurance by the reinsured company?

A. If there were no saving clause in the treaty, that is, to the effect that excess of loss reinsurance would not be considered as reducing and be considered as affecting the company's retention within the terms of the treaty, then in advising their reinsurer they should either state retention so much subject to excess of loss reinsurance.

Q. With respect to the net retention provision of Article VIII of the treaty between Union and Northwestern, state whether or not that particular form of net retention provision, or the substance of it, is a uniform provision customarily included in all reinsurance treaties?

A. The wording would vary somewhat but the substance of the provision is customary in all reinsurance treaties.

Q. Will you kindly state and explain to what

(Deposition of Walter J. Thompson.)

extent, if any, is [169] the custom or usage in the insurance business, if any, with respect to computation and statement of net retention by the reinsured company dependent upon the particular wording of the net retention provision in the reinsurance treaty?

A. They would indicate to their reinsurers their net retention in amount or in percentage.

Q. In view of the assumed facts and taking into consideration the provisions of Northwestern's excess of loss policy, can you compute the highest possible loss which Northwestern could sustain at its own risk and liability in the event of any one loss involving the Tacoma Narrows Bridge?

A. Well, they had a retention of \$50,000. Then there was 90% of the excess of \$30,000 so they would have \$30,000 of the loss and then \$2,000—maximum loss.

Q. What is the meaning in the insurance business, in view of the customs and usages of the business, of the term "P.M.L.", as used in the reinsurance certificate No. 10852 transmitted by Northwestern to Union, a copy of which I now show you?

A. It has no force. It merely indicates what in the opinion of the Northwestern is the probable maximum loss to be sustained on this cession.

Q. To what extent, if any, is the term "P.M.L." used to indicate the number of risks involved by the reinsured company in making cessions of reinsurance?

(Deposition of Walter J. Thompson.)

A. Usually each cession is supposed to be one risk, but if it does happen that a cession, for instance, under a reporting policy, would have a number of risks they would indicate on the bordereau more than one risk or various risks.

Q. Will you kindly state briefly the types or kinds of reinsurance? A. Do you mean all?

Q. The basic ones or those which come to your mind? [170]

A. There is facultative reinsurance; excess of line reinsurance, as used in the marine business; surplus reinsurance, as used in the fire business and inland marine business; excess of loss ratio reinsurance; excess of loss reinsurance; catastrophe reinsurance.

Q. Is there any basic distinction between the various reinsurances which you have specified?

A. The basic distinction is excess of line, facultative, excess of loss, and surplus, would be participating reinsurance; that is, they would participate as soon as the excess or surplus is determined. It becomes participating reinsurance.

Q. With the?

A. With the original company. On excess of loss reinsurance or excess of loss ratio reinsurance it becomes applicable as soon as the loss excess point is exceeded by the original company.

Q. Will you kindly refer to the excess of loss Lloyd's policy D-30477, and state what kind or type of reinsurance that might be considered under the two main classifications?

(Deposition of Walter J. Thompson.)

A. Excess of loss and also catastrophe reinsurance. Excess of loss in a single risk, and catastrophe reinsurance. [171]

Mr. Muller: That is all.

Cross Examination

By Mr. Cook:

Q. You made one statement I don't know if I understood or not. Where you say in reporting net retention to the reinsuring company you would not have to take into consideration any possible recoveries which would be made under a catastrophe reinsurance contract. Is that correct?

A. I think my statement was that if it can be considered that the ceding company's loss is reduced by the application—by pro-rata application over a number of risks, recovery received under a catastrophe cover—in other words, it would be assumed that the catastrophe covered when a number of risks were involved—then I don't think by reason of the fact that the loss on one risk which was involved in a catastrophe, that a number of other risks had been reduced, that such reduction would be considered a violation of the warranty.

Q. In other words, if this windstorm had, say, blown down a half dozen dwellings as well as the bridge upon which the Northwestern carried policies, and by reason of that fact made a recovery under their catastrophe policy, they still, as I understand you, would have made no mention of the

(Deposition of Walter J. Thompson.)

existence of the catastrophe cover in reporting their net retention on the bridge?

A. No, I think they would be—they would have to by reason of the fact that the excess point on the excess of loss reinsur- [172] ance was lower than their indicated retention on any one risk.

Q. Well, what I was leading up to: the reason, as I understand it, that you think the existence of this policy, Exhibit 1, should have been reported is because the excess point is below the \$50,000 retained loss. Is that correct?

A. That is right.

Q. And of course it is not customary to report the existence of catastrophe contracts?

A. No.

Q. And in catastrophe contracts you say the excess point is usually higher than this particular one is?

A. Higher than the top retention of the company on one risk.

Q. This policy, Exhibit 1, of Lloyd's is a catastrophe contract with a low excess point, isn't it?

A. It is an excess of loss contract on one risk and a catastrophe cover also.

Q. Then the excess point is lower than customary in policies of that kind, I take it?

A. As a catastrophe cover.

Q. The carrying of contracts similar in nature to that is very general in the insurance business, isn't it?

A. Yes.

(Deposition of Walter J. Thompson.)

Q. Would you say that it was practically a universal custom for companies to carry some form of excess cover? A. I would.

Q. And that fact is well known in the insurance world—that other companies do carry that kind of insurance? A. Yes.

Q. Your opinion that the existence of this policy, Exhibit 1, should have been reported to the Union is based on the assumption, is it not, that the Union did not know of the existence [173] of that policy?

A. No. I will say that the Union would assume that any excess of loss—any catastrophe cover which the Northwestern had would attach at least at the point—at least equal to or higher than the top retention indicated by the Northwestern.

Q. I possibly did not make the question clear. I am not asking you what the Union might be justified in assuming. I said that your answer was based on the assumption that they did not have actual knowledge of the existence of this policy. In other words, if they actually knew of the existence of this policy they would not be justified in assuming anything? A. That is right.

Q. The clause in the treaty between the Union and the Northwestern makes no mention of the existence of this Lloyd's policy, does it?

A. No.

Mr. Cook: That is all.

Mr. Muller: That is all.

JOHN ALDEN TOWERS

called as a witness by the Defendant, first duly sworn, testified as follows:

Direct Examination

By Mr. Dumett:

Q. Will you please state your name for the record? A. John Alden Towers.

Q. Where do you reside, Mr. Towers?

A. Berwyn, Pennsylvania.

Q. In what business are you engaged?

A. Reinsurance.

Q. With what firm are you connected? [174]

A. Towers, Perrin, Forster & Crosby, Incorporated. And I am also president of John D. Pryce & Company, Incorporated.

Q. The place of business of those firms is what?

A. Number 12 South 12th Street, Philadelphia.

Q. What is the nature of the business in which those firms are engaged?

A. We analyze the companies needs reinsurance wise, and design for them covers, which we feel are adapted to their needs, and which are approved by them, naturally.

Q. The nature of that business is entirely reinsurance? A. Entirely reinsurance.

Q. Will you state, please, Mr. Towers, the nature and extent of your experience in the insurance business and in the reinsurance business?

A. Well, I started at Kansas City, Missouri, where I was born, in 1918. We then had an insurance agency and an insurance brokerage business.

(Testimony of John Alden Towers.)

We also operated an insurance carrier, writing fire insurance—automobile dealers. We carried that on until 1923, and having started in 1919 an office in Philadelphia, we sold out the business in Kansas City and devoted our entire time to the reinsurance business in Philadelphia. During that time we were interested in finance and to an extent in the management of an agency and a brokerage business in Philadelphia, one of the oldest, the Henry W. Brown & Company, and Brown & Crosby Company. We also operated a reciprocal exchange of fire insurance for theatres, which was sold out also. Since 1933 we have devoted our entire time to reinsurance, but my personal time has been devoted to reinsurance since about 1920, in the main. I have also underwritten reinsurance for some American markets, and at the present time I am doing so for one market.

A. When you say the American market, what do you mean by that? [175]

A. Passing upon and approving the terms; in other words, accepting the reinsurance for the company.

Q. You are acting as agent and reinsurance broker and have operated a company, and you have had the experience of underwriting reinsurance contracts?

A. Yes, sir.

Q. All of those? A. That is right.

Q. In this case we have had reference from time to time by the various witnesses, as I understand it,

(Testimony of John Alden Towers.)

to the main types of reinsurance. We have the term pro rata or contributing reinsurance and also excess of loss reinsurance and catastrophe covers. In view of your experience will you state what those terms mean in the insurance business?

A. The first form of reinsurance was contributing reinsurance—pro rata contributing reinsurance. At first I think it was all done specifically. That is, it was placed individually on each risk. As time went on the business became large, and that became very burdensome—the details. And later treaties were evolved, similar to this Northwestern treaty. About 1905 one of my previous partners wrote the first excess of loss contract in this country, to my knowledge, according to Lloyd's. Then in 1907, immediately following the earthquake he wrote the first catastrophe cover.

Mr. Cook: I do not believe this is responsive, and it is obviously hearsay.

The Court: Just answer the question, and if you wish it to be read we will do that.

A. It is not hearsay, because I have seen the policy.

The Court: That is another matter. Read the question.

(Last question read by reporter.)

Directly state the meaning [176] of those terms.

A. The pro rata reinsurance contributes on each and every loss on a pro rata contributing basis. The excess of loss reinsurance reinsures the company against a loss greater than a certain named net loss

(Testimony of John Alden Towers.)

retention. A catastrophe cover is an excess of loss cover, except that the attaching point—that is, the net retention—is usually about twice the maximum line that a company writes on an individual risk, and in my opinion a catastrophe cover must have—to be a catastrophe cover—a retention greater than the amount a company writes on any single risk. That is the difference between catastrophe and excess of loss, to my mind.

Q. What is the amount of loss retention customarily named, under a catastrophe cover? Perhaps you have covered it; I don't know.

A. It depends entirely on the amount that a company accepts on individual risks. In other words, the underwriting practices of the company determine what would be a proper retention for a catastrophe cover. Now, some managements are naturally more conservative than others, and some name very high retentions. Others have relatively lower retentions. One that I know of has as high as a three million first lost retention. Others have as low as fifteen or twenty-five thousand dollars, but those having those low retentions are companies that write very small lines on individual risks.

Normally two or more risks would be involved in one occurrence for a catastrophe policy to attach. In fact until the early 1920's Lloyd's required a two-block cover.

Q. Meaning what?

A. Before the catastrophe cover applied risks in at least two blocks must be involved.

(Testimony of John Alden Towers.)

Q. I think perhaps you have covered this at the time counsel ob- [177] jected that it was not responsive, but I will ask it again. Which type of reinsurance you have referred to developed last?

A. The excess of loss.

Q. That was about when?

A. It became more or less in general use in the early twenties. The first one I know of was in 1916. The first catastrophe known to me was in 1905.

Q. Some of the witnesses in this case seem to disagree, or that is my impression, as to how extensive the practice is for insurance companies to carry excess of loss reinsurance and catastrophe covers. What have you to say from your experience as to the extent of the practice in the United States of companies carrying excess of loss and catastrophe covers?

A. I will try to answer that then, Your Honor. In our business we handle mutual, reciprocal and stock companies, and the custom as between those three classes varies. My reply would be an over-all average, whereas the reply of a witness handling only stock business would be a different figure, and one handling only mutual business would be a still different figure.

Q. What would be the over-all figure?

A. It naturally is a very rough estimate. I would say there would probably be twice as much pro rata reinsurance placed had not the excess of loss plan been adopted. In other words, the excess

(Testimony of John Alden Towers.)

of loss plan has supplanted, in my opinion, over-all roughly fifty per cent of the reinsurance requirements of the various companies.

Q. In the various questions which follow, Mr. Towers, for the sake of brevity I will refer to the plaintiff, the Northwestern Mutual Fire Association, as the Northwestern, and the the defendant, Union Mutual Fire Insurance Company, as the Union. Have you, at my request, examined a reinsurance treaty which is set forth in [178] the plaintiff's amended complaint in this action, and which is between the Northwestern and the Union, dated January 1, 1940? A. I have.

Q. By the way, does the reinsurance covered in that treaty come within the definition of pro rata or pro rata contributing reinsurance?

A. Pro rata contributing.

Q. And have you also, at my request, examined plaintiff's exhibit "1", or a photostatic copy of it, the excess policy of the Northwestern with Lloyds, D30477? And I now hand you the original?

A. I have.

Q. Plaintiff's exhibit "1" is what type or kind of reinsurance?

A. I would say it is a combination excess of loss and catastrophe cover.

Q. Why is that?

A. It is excess of loss because it is apparent that the retention is less than the amount retained by the Northwestern on individual risks. It is catastrophe

(Testimony of John Alden Towers.)

because it applies to an aggregate loss in any one occurrence regardless of the number of risks involved—one or more risk.

Q. Assuming that the Northwestern in June, 1940, notified the Union that it was ceding, under the treaty, to Union \$50,000.00 of reinsurance on the Tacoma Narrows Bridge, and that it was retaining an identical \$50,000.00 on the Tacoma Narrows Bridge, as of that date, would the exhibit "1", which you have before you, have any application, in your opinion, and, if so, what type of reinsurance is it?

A. Yes, sir. It is excess of loss reinsurance.

Q. And why is that?

A. Because the retention named under this excess contract is [179] \$30,000.00, and the Northwestern stated they were retaining \$50,000.00. The first loss retention is thirty, and there is a participation in excess loss—that is, losses above thirty thousand and ten percent by the Northwestern, making a total of \$32,000.00.

Q. Is the \$30,000.00 figure, as mentioned in exhibit "1", sometimes called the attachment point of the excess cover—or what is the correct term?

A. The ultimate net loss retention is usually the term.

Q. Is that a customary net loss retention—is that customary at \$30,000.00 in that regard?

A. I have answered before that the retentions vary according to the underwriting practices of the company. It would be, in my opinion, too low a

(Testimony of John Alden Towers.)

retention for it to be called a catastrophe cover—properly called a catastrophe cover—because it is less than the amount they write on one risk. It is a high net loss retention, as general excess contracts go. Considering as well as I know the underwriting practices of the Northwestern. It is an in-between and combination of the two, excess of loss and catastrophe coverage.

Q. You just used the term “general excess of loss.” What does that mean?

A. General excess of loss is used to apply to contracts where all risks written by a company are covered. An excess of loss contract applying to an individual risk is merely an excess of loss contract, but one which applies to every risk the company writes, with certain exclusions, is commonly called a general excess of loss contract.

Q. Does this have both of those features, exhibit “1”?

A. This does not have the individual excess of loss feature as such, but it applies to individual risks, one or more risks. [180]

Q. I will ask you to assume certain facts, if you will, and I will ask you a few questions based on it. Please assume the following facts: that at all times mentioned in my questions this reinsurance treaty of January 1, 1940, between Union and Northwestern was in effect; that this treaty provides, among other things that—I will skip that—that Northwestern in the latter part of June, 1940, executed and delivered to the Washington Toll Bridge Au-

(Testimony of John Alden Towers.)

thority in the State of Washington its policy of insurance insuring said authority against loss or damage by various perils therein specified upon the Tacoma Narrows bridge and approaches, but excluding the Administration Building, near the City of Tacoma in the State of Washington, in the sum of \$350,000.00; that subsequently, and also in the latter part of June, 1940, Northwestern transmitted to Union its Certificate of Reinsurance, or Daily Report, No. 10852, defendant's exhibit "A" in this case, notifying Union that it had ceded \$50,000.00 of said insurance upon the Tacoma Narrows Bridge to Union, and further notifying Union that Northwestern was retaining identical \$50,000.00 and that the PML was 50%; and furthermore assuming Northwestern specifically reinsured all but \$50,000.00 of said \$350,000.00 of insurance; and further assuming that at the time Northwestern made said cession to Union the Northwestern was reinsured under an existing excess of loss reinsurance policy, No. D30477, and assume further that Northwestern in making said cession of \$50,000.00 to Union, and in computing and advising Union in the Certificate of Reinsurance No. 10852 of Northwestern's net retention, under its treaty, considered only specific reinsurance and gave no consideration to the excess of loss policy No. D30477; now assuming those facts, I wish to call your attention to Article 8 of the reinsurance treaty between Union and Northwestern, dated [181] January 1, 1940. You can turn to the copy of that, and I wish to call

(Testimony of John Alden Towers.)

attention to this term in Article 8: "The amount of cession hereunder shall not exceed the amount retained net without reinsurance by the reinsured company at its own risk and liability upon the same property reinsured by the said reinsured company with the reinsuring company". I would like to ask you what is the meaning in the insurance business, in accordance with the customs and usages of that business, of that term I have just referred to?

A. I could not improve on the wording. I could not make it more clear. In other words, I would say that it is the amount which the ceding company could lose, the maximum amount it could lose, in the event of a total loss on an individual risk, if no other risk were involved, which is a definition we have employed for ten or fifteen years in connection with net retained lines. But this wording means to me what it says. It goes further than most treaties, but it means the same thing. I mean its intent is customary. It goes further by defining what retained net means.

Q. What does the term "without reinsurance" mean in the reinsurance world?

A. That means what it says. It means the company will lose that amount out of its own surplus, and no other company will pay any part of that loss.

Q. Is that clause or definition, in your experience, a standard form customarily found in reinsurance treaties?

A. The wording of pro rata treaties comes to the same meaning. The wording somewhat varies. As I said before, this goes further than most word-

(Testimony of John Alden Towers.)

ings, in that it defines what amount retained net means, but the words, "retained net" would mean the same thing as that definition in usual custom.

[182]

Q. Referring again to that term "The amount retained net without reinsurance by the reinsured company at its own risk and liability on the same property", is the particular wording of that provision found in just that way in all treaties, in your experience, or do the net retention clauses in treaties vary, and, if so, how?

A. I just said they did vary. I have here a copy of the Uniform Reinsurance Agreement approved by the Federation of Mutual Fire Insurance Companies. I could not say this is the last one. It is the last one I have seen, and it has wording to the same effect, but it simply says——

Mr. Cook: This is not responsive to the question.

The Court: The objection is sustained.

Q. I will ask you another question. I think, if I may point out in the presence of the witness, I asked how they varied, and, if so, how. I will ask if you will refer to a uniform provision—of what association is that?

A. The Federation of Mutual Fire Insurance Companies. That is the federation of mutual companies—an association or organization that many of them belong to.

Q. And what is the wording of that?

A. "The company shall retain"—I use the word

(Testimony of John Alden Towers.)

“company” instead of “blank”—“The company shall retain in or on the same risk an amount at least equal to blank percent of the amount ceded to the”—in this case it would be “Union.”

I think that is the customary wording, but I don't think that means anything different than this, except this goes on and defines what this means.

Q. Is it normal for a company ceding reinsurance and stating its net retention to its reinsurer, to advise its reinsurer of the existence of excess of loss reinsurance which might affect its [183] loss thereafter?

A. It is as respects excess of loss, but not as respects catastrophe. Out of an abundance of precaution we advise our clients——

Mr. Cook: That is not material what he advises his clients. I don't like to object, but——

The Court: The objection is sustained.

Q. You say it is customary with respect to excess of loss? A. Yes, sir.

Q. How is that done?

A. It is done in the printed blanks on specific reinsurance, or in cables or letter correspondence. I am not speaking of treaties now. Companies usually have printed forms, either prepared by their brokers or prepared by their own people, upon which this information is disclosed. As regards treaties it is usually done by specific mention in the treaty, or by exchange of letters.

Q. Those various methods are used?

(Testimony of John Alden Towers.)

A. Yes, sir.

Q. Which is the more common?

A. With the stock companies I would say that usually the excess of loss is ignored, keeping in mind most stock companies are on a loss cost plan or excess loss of reinsurance. With mutuals I would say probably half of them have by prearrangement arranged to ignore excess of loss covers. The other half agree to report absolute net after deducting excess of loss reinsurance. It is all a question of agreement.

Q. And when you refer to agreement what do you mean? Do you mean in the treaty itself ordinarily?

A. Agreement between the two contracting parties expressed in a letter or in the treaty itself—exchange of letters.

Q. In view of your experience and under the custom and usage of [184] the insurance business, would you point to any customary example of a treaty, for instance, containing a specific reference to excess of loss?

A. I have a copy here of a report on one of our clients, which is a blank we furnish and is used by about half of our clients, for the purpose, and it says "Net retention on this risk with no"—the "no" is underscored—"deduction for amounts recovered by general excess of loss reinsurance." That was prepared in 1933.

Q. Is that a treaty provision?

(Testimony of John Alden Towers.)

A. This is an application for specific pro rata reinsurance on an individual risk.

Q. Have you another example?

A. I would say half of our clients use this form on printed blanks, and others do it by letter or cable.

Q. Can you give us an example of a provision customarily used in the insurance business by a treaty that make a specific reference to excess of loss?

A. I don't know of a single treaty we have that does not, and about once a year we write to every client to remind them of the importance——

Mr. Cook: I object as not responsive.

Q. I will ask you another question. Can you give us an example of a treaty provision which expressly refers to excess of loss?

A. Here is one clause taken from one contract: "It is understood and agreed that effective blank 1937 the blank Fire Insurance Company shall have the right to carry excess of loss reinsurance in respect to their own net retention, and that:

1. As regards pro rata reinsurance ceded by the blank Fire Insurance Company, prior to the blank day of blank, 1937, the net retained line of the blank Fire Insurance Company, on [185] any one risk, shall not be considered as being reduced by any amount recoverable from excess of loss reinsurance;

2. As regards pro rata reinsurance ceded by the blank Fire Insurance Company with effective

(Testimony of John Alden Towers.)

date on and after the blank day of blank, 1937, the net retained line of the blank Fire Insurance Company on any one risk shall be considered to be an amount equal to the ultimate net loss (after deducting amounts due from excess of loss and other reinsurances) that the blank Fire Insurance Company could sustain if the loss on such risk were totaled and no other risk was involved in the same occurrence.”

Another example taken from another contract: “For all purposes of this agreement of reinsurance the net retained line of the reinsured shall not be considered as being reduced by any amounts recoverable from excess of loss reinsurance.”

A third example, taken from another contract: “It is understood and agreed that the company may effect excess of loss reinsurance in respect of its net retained liability, and notwithstanding anything herein contained to the contrary the afore-said excess reinsurance shall not be taken into account in calculating the net retention of the company for the purposes of this contract, nor shall it in any way prejudice the company’s right of recovery hereunder.”

Those, I think, are the main clauses that I have seen.

Q. Treaty clauses? A. Treaty clauses.

Q. Have you in your experience seen daily reports or certificates of reinsurance of the treaty reinsuring company to its reinsurers specifically mentioning such loss as affecting net retention?

(Testimony of John Alden Towers.)

A. I have. [186]

Q. May I ask you, to show the extent of your company's business, how does the company with which you are connected, compare in size with re-insurance companies of the same sort throughout the United States?

A. Ours is a brokerage company—a reinsurance brokerage company. If you mean how many clients we have—is that what you mean?

Q. Yes.

A. I haven't counted them recently, but I think 150.

Q. Has it ever been customary for your company in advising these clients to issue any periodical instructions with regard to net retention, or suggestions?

A. About once a year.

Q. Have you, at my request, brought a sample of one of those with you?

A. I have.

Q. Might I see it, please? (handed by witness to counsel) May I ask you with respect to these once-a-year instructions or suggestions you have reference to, they are sent to whom by your firm?

A. To our clients. Not necessarily once a year. I mean there is no annual sending of them out, but I would say roughly we have done it approximately that often.

Q. And are these clients to whom you send it all insurance companies?

A. All insurance companies or reciprocals which are clients of ours.

Q. When Mr. Cook has an opportunity to look

(Testimony of John Alden Towers.)

at it I will offer it in evidence, as illustrative of your testimony, regarding custom and usage. I offer it purely for illustrating the testimony of the witness. May I ask you another question in regard to this exhibit A-12. With regard to A-12 for [187] identification, this particular document you gave me, is that in similar form or not to other notifications of the same general nature?

A. It probably is not the same. It would not be in similar form, because we do not use a copy from one year to the next. We simply call attention to the fact especially on facultative placings, which are placed individually, they are more apt to overlook advice than they are on treaties.

Mr. Cook: I object to this, because obviously it is directed to the issue in this case. When it was prepared I do not know, but from reading it that is what is in my mind, and I don't think they can prove usage or prove the meaning of a particular term of usage by showing one specific event, and they are attempting to do that in this case. Expert testimony must be of a general character, and limited to the usage generally in the insurance business.

Q. Was this particular one prepared with reference to any issue in this case?

A. The same issue is involved exactly, and it is to avoid the issue that those letters have been sent out to them.

Mr. Dumett: This is dated August 12, 1942. For the moment I will not offer it.

(Testimony of John Alden Towers.)

Q. These instructions or suggestions which you testified you send out periodically, and approximately once a year, to your clients, what is the subject matter of those?

A. It is to caution them to advise markets to which they are ceding business of any excess of loss reinsurance which dips down into the retention named under the cession. The very thing we are discussing here.

Q. How long approximately has your company been advising its clients in that regard? Can you tell us approximately? [188]

A. 1933 is the first one I found.

Mr. Dumett: I think in view of Mr. Cook's objection on the date of this one, I will not offer this particular document. May I withdraw it?

The Court: Is there any objection to withdrawing it?

Mr. Cook: No, your Honor.

The Court: It is withdrawn, and it may be returned to the witness who furnished it.

Q. (Mr. Dumett) Mr. Towers, referring to plaintiff's exhibit "1", the Northwestern excess of loss policy, can you state whether or not that is a fluctuating or flat premium policy?

A. A flat premium policy.

Q. What does that mean?

A. The loss experience under the policy does not affect the rate for that particular policy. In other words, it is a flat rate policy, and not a fluctuating rate policy.

(Testimony of John Alden Towers.)

Q. A fluctuating rate policy is based on loss experience? A. Yes, sir.

Q. Subject to a minimum and a maximum rate, depending on the loss?

A. Subject to a minimum and a maximum rate, depending on the loss during the contract.

Q. You mean by that the rate may increase, depending on the experience?

A. The normal loss cost policy starts off with a rate based on a previous experience, usually sixty months. Then each year the experience under the contract is added to the previous experience, and the first year of the previous experience dropped, to the end that the same period of time is used to compute the loss cost percentage.

Q. In view of the customs and usages of the insurance business is a pro rata reinsurer customarily interested in whether the [189] reinsured's excess of loss coverage is on a flat or a fluctuating premium basis?

A. Well, naturally if the excess contract is on a fluctuating rate basis the ceding company has more interest in losses which occur than if it is on a flat rate basis. While the renewal rate on a flat rate contract is apt to be increased it is not mandatory. I mean you can change markets or refuse to renew, whereas under the fluctuating rate basis you must pay for having had your losses, by way of increased rates, and, therefore, such a contract it is more often ignored for purposes of net retained line than the flat rate contract.

(Testimony of John Alden Towers.)

Q. Exhibit "1" is a flat rate contract?

A. That is right.

Q. Under the customs and usages of the insurance business why is it important for the reinsuring company to be advised by the ceding company of excess of loss reinsurance as well as specific contributing reinsurance?

A. The company accepting the cession normally has very little information concerning the risk ceded. There is a certain amount of confidence established between the two parties else the contract would not have been entered into, and the company accepting the cession relies upon the amount that the ceding company retains net for its own account to determine how much it will retain net of that cession, or how much it will pay off by way of retrocession. Therefore, any type of reinsurance which tends to reduce the net amount of the risk of the ceding company affects the transaction. It causes the accepting company to realize that the ceding company has certain protection. If that is known then it acts accordingly.

Q. Can you illustrate why that is important to the reinsuring company? [190]

A. Well, we have placed contracts with very low net loss retention—excess of loss contracts. I think the extreme case is one of 499,000 over 1,000.

Q. When you say "499,000 over 1,000" you mean what?

A. That the reinsured company has a maximum loss retention of 1,000 on that risk, even though it

(Testimony of John Alden Towers.)

has issued its policy for half a million or more—well, for half a million, as it is issued for more than it is liable for on the 1,000. That is a very extreme case, but it shows how important it is for the accepting company to know of the excess of loss contracts which affect a loss on that particular risk. Otherwise that company could cede half, if it had a half million dollars, whereas it only has \$1,000.00.

Q. By reason of the excess of loss?

A. By reason of layers of excess, one on top of the other.

Q. In a case like the present one, if a reinsuring company in the position of the Union had in the daily report or a wire been advised by the reinsured company that the reinsured company was protected by an excess of loss policy similar to exhibit “1”, what would the reinsurer customarily do?

Mr. Cook: That is objected to as speculative, Your Honor—wholly so. He doesn’t know what the Union would do under those circumstances.

Mr. Dumett: I am asking about a company under similar circumstances.

The Court: The word “would” is inconsistent with “customarily.” It *should what* he customarily does.

Q. I will change the latter portion of the question to ask you what does, if you know, the reinsuring company customarily do? [191]

(Testimony of John Alden Towers.)

A. It would probably do one of two things, either——

The Court: No. Note the form of that question; what does it customarily do? Not what it probably would do, or something of that kind.

Q. It is a question of custom, from your knowledge of the business.

A. It either retrocedes a larger part than it would otherwise, or refuses to accept as much as the amount offered.

Q. In view of the assumed facts which I asked you to assume yesterday, and considering Article 8 of the Union-Northwestern treaty, and considering also Northwestern's excess of loss policy, exhibit "1", can you compute, Mr. Towers, the amount retained net by the Northwestern without reinsurance by the reinsured company at its own risk and liability on the same property—that is to say, on the Tacoma Narrows Bridge?

A. \$32,000.00.

Q. And this question, if you please: Again in view of the assumed facts and in view of Article 8 of the treaty, and in view of plaintiff's exhibit "1"; what, if you know, was the highest possible loss which the Northwestern could have sustained at its own risk and liability on this bridge in the event of any one loss? To the bridge itself?

A. The same answer: \$32,000.00.

Q. Could those computations have been made when the cession in suit was made in June, 1940?

A. Yes, sir. Because that is the maximum pos-

(Testimony of John Alden Towers.)

sible loss in the event what you call exhibit "1" was sound protection, which must be presumed.

Q. Referring to defendant's exhibit A-5, which is the daily report from Northwestern to the Union, which I believe you have read, have you not?

A. I have seen it. [192]

Q. Referring to that daily report, what is the meaning in the insurance business of the term PML? Counsel, I think, will want to preserve an objection to that, and I am willing to make the same stipulation.

Mr. Cook: Yes; I would like to renew the objection I made to this line of testimony. Your Honor, as it came out in the depositions, on the same grounds.

Mr. Dumett: I have no objection to that.

The Court: I am not sure I am advised what the Court's ruling was.

Mr. Dumett: The Court ruled it would be admitted subject to the agreement counsel's objection would run to that entire line of testimony on PML.

The Court: It being the same principle, the Court makes the same ruling now, and consents to the arrangement mentioned.

A. PML are the initials used to designate the probable maximum loss in the opinion of the underwriter ceding the risk.

Q. In the custom and usage of the insurance business, is that term used in reference to single

(Testimony of John Alden Towers.)

risk structures as well as multiple risk structures?

A. Yes, sir.

Q. Several risks? A. Yes.

Q. And to what extent, if any, is the term PML itself used to indicate the number of risks involved?

A. As it applies to either one or to more than one risk of a schedule or blanket form, it is apparent it does not mean, or it does not indicate the number of risks.

You might have a cession on one risk which is a total loss property, where the PML is stated as 100%. On another risk you might have a fire resistive building with cut-off. The estimate [193] of the underwriter might be much lower than 50%, 20% or even in the case of a large fire resistive building, as low as 5% PML.

In the case of one building I happen to know of 44 stories, each floor cut off, a modern fire-resistive building, estimated as 5% PML.

Some underwriters would say each one of those floors might be a risk. Others might say three or more floors would be a risk. PML does not indicate the number of risks. It indicates the probable maximum loss which the accepting company can expect on that particular cession.

Q. Under the customs and usages of the insurance business how do reinsuring companies customarily indicate the number of risks involved, if more than one?

A. Usually by separate cessions, if it is a treaty

(Testimony of John Alden Towers.)

which calls for binder notices or cessions. However, in some cases the cession will show various risks, or 20 or 22 risks, naming the number of risks. If it is a treaty which only calls for a bordereaux report that information is unusually put in the "Remarks" column, if it is more than one risk.

The Court: At this point I wish you would remind the Court of your understanding of the usual meaning of a bordereaux.

A. A bordereaux is a statement usually made monthly under a treaty to show the information which the accepting company requires for its underwriting purposes, its accounting records and its reports to its own state department. Bordereaux statements have become less and less detailed as years have gone by, as the volume increased, until now it is quite a brief statement, usually showing the cession number, name of the assured, location of the assured, amount of retained net by the ceding company, amount ceded, whether it is a one-year, three-year or [194] five-year policy, and the premium.

Q. (Mr. Dumett): It is a type of report then, I take it, from the reinsured company to its reinsurer, to advise the reinsurer of the things it wants to know?

A. Yes, sir; that is right.

Q. Mr. Towers, to what extent is the book called Best's Reports used by reinsuring companies in considering cessions from reinsured companies?

(Testimony of John Alden Towers.)

A. Oh, I don't think it is used in considering cessions. It is one of the best known reference books. The Spectator is another similar book. There are others, the Argus Field and the Weekly Underwriter. I doubt if they give as full information as the Spectator or Best's. It could not be used for cessions, because it is presumed the companies dealing between themselves know more about the position of each company than Best himself would know.

Q. And in the custom and usage of the business to what papers do the parties ordinarily, in the transmitting and considering of cessions or reinsurance—what are the basic papers that they look to, generally speaking?

A. When you say "papers" you restrict me.

Q. Documents or sources of information.

A. When two parties meet they probably know of each other's company; they know its reputation and standing; they discuss the possibility of reinsuring with each other, or one with the other, if it is a one-way treaty, and in that discussion it is normal for questions entering into the transaction to be discussed between the parties. Then usually some confirming letters are exchanged, and a treaty results, such as this treaty here.

Q. And after that then the mechanics are what in actually placing the insurance? [195]

A. The placing of the business as provided by the treaty contract.

(Testimony of John Alden Towers.)

Q. Is that where the daily reports—is that the correct term—where the daily reports come in?

A. They all mean the same kind or thing—the cession of binder notice, or daily report or bordereaux; they all accomplish the same purpose.

Mr. Towers, you have testified that in view of the custom and usage of the insurance business, the definition of net retention, as given in Article 8 of the treaty, would result in a computation of net retention on this bridge of \$32,000.00, under Article 8. I want to ask you this question: Assume that on November 7, 1940, the date of the collapse of the Tacoma Narrows Bridge, the same wind storm that destroyed the bridge destroyed another bridge; Bridge B—in the same vicinity; and assume further the Northwestern at that time had issued and outstanding a policy covering Bridge B, identical in form with its policy on the Tacoma Narrows Bridge—in other words, a \$350,000.00 policy—which it had ceded down specifically to \$50,000.00; assume that the windstorm of November 7, 1940, totally destroyed both bridges; now assume those facts and considering Northwestern's excess of loss policy, Exhibit No. 1, what would have been the amount of the ultimate loss the Northwestern itself would have paid?

\$A. \$37,000.00.

Q. That \$37,000.00, would that be the ultimate loss covering both bridges, the Tacoma Narrows Bridge and Bridge B?

(Testimony of John Alden Towers.)

A. I understand if you had the two bridges you would have \$100,000.00 loss, and the excess contract covers 90% above thirty, so the first thirty, plus 10% of the next seventy, or \$7,000.00, makes up the \$37,000.00 loss.

Q. Now how would that \$37,000 loss be allocated as to each bridge? [196]

A. For what purpose would it be allocated?

Q. For the purpose of determining as near as possible what share each bridge had in that loss. I am probably stating it inaccurately, but of the \$37,000.00 loss the Northwestern would have to pay, what it would be fair to allocate to each bridge?

A. For the Company's own records if the loss was total on each bridge and the amounts were the same, it would allocate half the loss to one bridge and half to the other.

Q. That would be \$18,500.00?

A. Yes, sir; \$18,500.00 each.

Q. Now assume the same facts I just asked you to assume, but assume a third bridge, Bridge C, in the same district, and covered by the identical insurance, if you don't mind, covered by the identical insurance, the three bridges totally destroyed by the same wind storm on November 7, 1940, and again apply Exhibit No. 1, the excess of loss policy, what would be the ultimate loss of the Northwestern itself in that event, the total loss of three of them?

A. You would have the \$30,000.00 again as the

(Testimony of John Alden Towers.)

first loss retention, and the balance of the loss being \$120,000.00, you would have 10% of \$120,000.00 or \$12,000.00, making a loss total of \$42,000.00 on the three bridges.

Q. \$42,000.00. And if you allocate that on the same basis with three bridges, that would be what for each bridge?

A. One-third of \$42,000.00 is \$14,000.00 each.

Q. Now do the answers which you have just given to these two hypothetical cases, to the two bridges and the three bridges, do the answers which you have given to those questions affect in any way the testimony you have previously given that under Article 8 of the Northwestern-Union treaty the amount retained [197] net by Northwestern without reinsurance at its own risk and liability was \$32,000.00?

A. No. It would still be \$32,000.00, because you do not consider any but the one risk ceded. The retention, if any, would be reduced but it would not be customary for a company to contend that the net carried was less than it would have been had no other risk been involved in the loss. Catastrophe coverage, in other words, is not customarily considered in arriving at the net loss retention on an individual risk.

I say catastrophe cover as I have previously defined it, which is a cover in excess of the net loss retention on any individual risk.

Q. By the way, what is the distinction—you may have covered this, but I am not sure—what is

(Testimony of John Alden Towers.)

the distinction, if any, between your terms "net retention" as defined by Article 8, retained net without reinsurance at its own risk and liability, what is the distinction between that and ultimate loss?

A. Well, the amount retained net is the amount which is the maximum that the reinsured company could lose in the event of a total loss.

The loss might be partial, so the ultimate net loss might be anything from one penny up to the amount of the liability, net retained liability. They are entirely different things.

Q. Can the exact amounts of ultimate loss ever be determined in advance of a loss?

A. You would have to have a loss.

Q. Can the amount retained net without reinsurance at its own risk and liability be determined without a loss?

A. Yes, sir. The net retained line at its own liability can be determined.

Q. Because it is named at the time of the cession? [198]

A. At the time of the cession.

The Court: What does the word "line"—l-i-n-e (spelling)—mean as you used it there?

The Witness: The same as liability.

Q. (By Mr. Dumett): Again in view of your testimony regarding the \$32,000.00 net retention, as defined in Article 8, I would like to ask you, assuming the Tacoma Narrows Bridge was insured in accordance with the facts stated here, had sustained ten separate and distinct losses over the pe-

(Testimony of John Alden Towers.)

riod of a year, each loss resulting from a separate and distinct cause, what would have been the aggregate ultimate loss that the Northwestern itself would pay?

A. How much was each of those ten losses?

Q. I am assuming \$5,000.00 each.

A. They would have paid \$50,000.00, because the excess commences at thirty, each and every occurrence, and these being different occurrences the excess cover would not have come into play.

Q. In other words, Plaintiff's Exhibit No. 1, the excess of loss policy, you say would not have come into play at all? A. That is right.

Q. Because no one separate loss was large enough to reach the \$30,000.00?

A. That is right.

Q. By the way, I wish you would clear this up, if you can. In the event of a series of separate losses, separately caused, as I have just assumed, where the amount left after specific reinsurance was \$50,000.00, as here, one first loss of \$5,000.00, we will say today—what happens—is the insurance reduced from \$50,000.00 to \$45,000.00, or what?

A. It is, but it is customarily reinstated back to the \$50,000.00 after each loss. [199]

Q. I will ask you to assume one other thing. I asked you to assume five separate losses. Assume you had ten separate losses on the Tacoma Narrows Bridge over the period of a year, each loss resulting from a separate and distinct cause, what

(Testimony of John Alden Towers.)

would the aggregate loss of the Northwestern be?

A. I think you asked about ten before.

Q. Assume twenty separate and distinct losses on the Tacoma Narrows Bridge over the period of a year, and assume each of these losses was due to a separate and distinct cause, and assume that each of these twenty separate losses amounted to \$10,000.00, what would be the aggregate ultimate loss which the Northwestern would have to pay?

A. That is twenty losses at \$10,000.00 each?

Q. Yes. Make it twenty losses of \$5,000.00 each.

A. Twenty losses at \$5,000.00 each, again assuming that each was reinstated, would cause an aggregate loss of \$100,000.00.

Q. In that assumed case may I ask would the Northwestern's excess of loss policy come into play?

A. It would not.

Q. No one loss would have reached the \$30,000.00?

A. That is right.

Q. Do the answers which you have given to these last two hypothetical questions, the separate and distinct losses, separately caused, do those answers affect the answer you have given previously that the amount retained by the Northwestern at its own risk and liability was \$32,000.00?

A. No; because in the other cases you have taken partial loss examples, and as I say the net loss has nothing to do with the net retained liability, that is, they are distinct and separate things.

Q. Of course if a couple of separate losses occur within a 48-hour [200] period I believe that

(Testimony of John Alden Towers.)

would be one loss, under Exhibit No. 1, would it not? A. If they are due to wind storm.

Mr. Dumett: You may examine, counsel.

Cross Examination

By Mr. Cook:

Q. Mr. Towers, you are acquainted, I assume, with all four of the gentlemen whose depositions were taken in New York?

A. No; I never met Mr. Thompson.

Q. The other three you are acquainted with?

A. Yes.

Q. Mr. Pryce, I believe, is a director of your Company? A. That is right.

Q. And a business associate of yours?

A. Naturally.

Q. You have discussed, have you not, this situation with Mr. Pryce? A. Many times.

Q. And you had prior to the time he gave his deposition in New York?

A. Even prior to the case being filed.

Q. And you have discussed it, I assume, with the counsel in New York who appeared for the Union at the taking of those depositions?

A. Yes. Not to any great extent.

Q. How many times did you discuss it with them?

A. Over long distance telephone two or three times.

Q. With Mr. Muller? A. Yes.

Q. Now in relation to your testimony, Mr. Tow-

(Testimony of John Alden Towers.)

ers, I take it you make a distinction between a true excess of loss policy and a [201] catastrophe policy?

A. Both are excess of loss, but one is called a catastrophe because the attachment point—the net loss retention is greater than the maximum net line on any one risk. In other words, it will not affect—it will not be called into play on an individual risk—correct.

Q. All right. The true distinction between an excess of loss policy and a catastrophe policy is whether or not the attaching point is lower than the Company retains on one risk?

A. That is right.

Q. Is that not correct?

A. That is right. I would go a little further and say that normally they are written on the basis of two or more risks, but my personal opinion is that you could call a cover which does not come into play on one risk a catastrophe cover.

Q. So that any policy, the attaching point of which is higher than the amount the Company retains on a single risk, in your judgment, is a catastrophe policy?

A. Yes. I would call it a loss retention catastrophe policy.

Q. While an excess of loss policy is one which attaches below the amount retained by the Company on a single or individual risk?

A. That is right.

Q. And it is for that reason that you have in your judgment termed Plaintiff's Exhibit No. 1

(Testimony of John Alden Towers.)

an excess of loss policy rather than a catastrophe policy?

A. I said it was a combination of both, I think, Mr. Cook.

Q. I think you did. But for that reason you consider it at least partially an excess of loss policy?

A. That is right.

Q. You heard the depositions of these four gentlemen which were read yesterday, did you not?

[202]

A. Yes, sir.

Q. Do you recall that their distinction and their definition and the reason they assigned for calling Exhibit No. 1 an excess of loss policy was for the same identical reason which you have assigned?

Mr. Dumett: Just a moment. That is objected to on the ground it is not proper on direct examination or cross examination to ask this witness to summarize, interpret, or construe the testimony of other witnesses. What that testimony may have been the Court will recollect, and it is in the record. It is proper to ask this witness anything bearing on the views he has expressed here, as his own view, but not to comment upon or construe the testimony of other witnesses. I think it is improper cross examination, and I object for that reason.

The Court: I think the question as put is subject to the objection. This witness can be asked to assume such and such a situation is in the record.

Mr. Cook: I will not stress it.

The Court: The objection is sustained.

(Testimony of John Alden Towers.)

Q. (By Mr. Cook): The thought I had is simply this—let me ask you this way. The definition which you have given and the distinction which you have made between those two policies is the recognized and definition in the insurance world, is it not?

A. I think that those familiar with excess of loss covers would hold to somewhat the same opinion, but I do not agree with you that the answers in those—

The Court: That has been disposed of.

Mr. Dumett: Yes. It has been stricken.

Q. (By Mr. Cook): But you do agree with me that your definition, as you have given it, is the correct and accepted one in the insurance world?

[203]

Mr. Dumett: That question has been asked and answered.

A. I would say that is my opinion.

Q. (By Mr. Cook) All right. Going one step further, you testified yesterday, and I believe again this morning, that it was neither customary or necessary in your judgment for a company to report the existence of a catastrophe policy when making specific cessions?

A. I said out of an abundance of caution it would normally be done, but I did not think it was necessarily done, and not always done by any means.

Q. You have the distinction I am making between catastrophe and excess of loss?

(Testimony of John Alden Towers.)

A. That is right. And the question pertained to catastrophe covers, did it not?

Q. That is right.

A. Yes, sir; that is right.

Q. And did you not further say the reason why it was not necessary to report the existence of a catastrophe policy was because the attaching point was above the amount retained on a single risk?

A. Yes. And would not affect the underwriting of the ceding company on that risk directly; only in the event it would be involved in one occurrence with other losses, which does not affect the underwriting of a company in a normal way.

Q. And in reporting the amount retained the Company need not consider anything which they would collect if more than one risk is involved in a loss?

A. Yes, sir. They must consider anything that they would collect on that particular risk. In other words, if the retention on the risk ceded—if the retention under the catastrophe cover exceeds the amount retained net on the risk ceded, and they [204] could collect in the event of a total loss if no other risk were involved, they should report it. I don't know whether that is your question, but that is what I understood your question to be.

Q. That was not my question, Mr. Towers. My question was this. That where the amount retained is less than the attaching point of the catastrophe

(Testimony of John Alden Towers.)

policy on a single risk, then that catastrophe policy need not be considered in reporting that retention?

A. That is correct. If the retention—net loss retention—catastrophe cover under an excess of loss cover exceeds the amount retained net by the company ceding, I would say it would be customary for the accepting company to waive the coverage—to ignore it.

(Short recess)

Q. (By Mr. Cook) Mr. Towers, getting back to this same thought we had before recess, do I understand that if the retention as reported by the Northwestern to the Union had been less than \$30,000.00 on a single risk, then there would be no complaint on the part of the Union?

A. It would be customary that there would be no complaint. I cannot say what the Union might have done.

Q. (By Mr. Cook) If the retention of the Northwestern on a single risk was less than \$30,000.00 would the method employed here be in accordance with the practice of the insurance world?

A. My answer is yes.

Q. And there would be in your judgment no need for them to have said anything about the existence of Plaintiff's Exhibit No. 1?

A. It would normally have been done, but not on a cession. It would normally have been done at the time the treaty was in force, and normally the treaty would have said, "Catastrophe [205] rein-

(Testimony of John Alden Towers.)

insurance ignored for the purpose of this contract," or words to that effect.

Q. But it could have no effect if their retention on a single risk was less than \$30,000.00?

A. It would not be customary to object to the claim—that is really what you are after.

Q. Then doesn't this lawsuit narrow itself down to this point, and that is what was the net retention—

Q. (By Mr. Cook) Before we get into that, will you explain what is a single risk in the insurance world?

A. Well, I spent three weeks trying to word a definition of single risk which would be approved by certain underwriters on a contract before I got an answer which was approved, and later found that there were flaws in that definition, and so I am afraid I cannot answer that question.

Q. To the best of your ability can you define to the Court what is a single risk?

Mr. Dumett: You mean the witness' own definition or the customary definition?

Mr. Cook: I mean the customary accepted definition in the insurance world.

A. I finally defined it by stating what was more than one risk, which was that two properties unlikely to be affected in the same occurrence would be considered as more than one risk.

Q. (By Mr. Cook) You referred to a 44-story building located some place that you were familiar with, a fire-proof construction, I believe you said,

(Testimony of John Alden Towers.)

with cutoffs between each floor, and so forth, and you said that some underwriters would consider that as 44 separate risks, I believe?

A. For fire purposes.

Q. For underwriting purposes? [206]

A. Underwriting fire.

Q. For placing insurance on that building?

A. Not tornado or wind storm.

Q. But underwriting a fire policy on that property?
A. That is right.

Q. And the reason for that was because each floor, in the judgment of the underwriter, was a separate unit subject to damage by a single fire?

A. That is right; in that particular underwriter's judgment.

Q. And you would have there in that one building 44 separate risks in the judgment of that underwriter?

A. Except that he called it 5% P.M.L., showing he didn't mean that 5% P.M.L. meant 44 risks. In other words, it was his judgment that not more than 5% of the value would be involved in a loss?

Q. It is of course customary in all kinds of insurance, is it not, for an underwriter to determine the number of risks on a particular property?

A. An underwriter reviews the diagram of the risk or such inspection reports as he might have or descriptions of the risk, and determines to his own satisfaction whether he considers it more than one risk, yes, for the purposes of the perils covered.

(Testimony of John Alden Towers.)

Q. That is the customary and accepted method of underwriting property, is it not?

A. Yes, sir. And this opinion varies with different underwriters.

Q. Do you know how many risks the Tacoma Narrows Bridge was underwritten by the Northwestern as?

A. For what peril?

Q. For the policy which is involved in this case.

A. The policy involved covers many perils. It covers collapse, wind storm, fire, flood, earthquake, and so forth. So the bridge—I am guessing—I have no way of knowing what the [207] Northwestern did, but I am saying it would be normal——

Q. If I may interrupt. My question is, do you know how many risks this bridge was underwritten by the Northwestern as?

A. I cannot imagine it being over one risk.

Q. You don't know? A. No.

Q. Assume that the Tacoma Narrows Bridge was underwritten by the Northwestern for the policy involved here as two separate risks, in reporting net retention to the Union Mutual would the Northwestern have had to consider, in your judgment, or in the custom and practice of the insurance world, the existence of Plaintiff's Exhibit No. 1?

A. I cannot assume that, because if they had——

Q. (By Mr. Cook) Just a moment, please. I am asking you to assume that. You don't have to pass on the merits of it at all. But assume as a fact that this bridge was underwritten by them as two separate risks, then would Exhibit No. 1 have had

(Testimony of John Alden Towers.)

to be considered by them in reporting a retention of \$50,000.00 to the Union Mutual?

A. My answer is that you cannot make black out of white, and that even though the ceding company is the sole judge of what constitutes one risk, that does not give him the right——

A. (continuing) ——to cede what would be customarily called one risk as two risks, and the fact that the ceding company wired for permission to exceed the limit named in the treaty of \$25,000.00 indicates quite strongly that the ceding company realized—most underwriters would consider this one risk. [208]

Q. (By Mr. Cook) Assume that the Northwestern Mutual actually underwrote this bridge as two separate risks——

The Court: Namely, please. Let the witness know the two you have in mind, by stating them in your question.

Q. (By Mr. Cook) Two separate units subject to a loss. You understand what I mean by a risk in that question.

A. I am afraid I cannot conceive of a bridge insured against the peril of collapse and earthquake——

Q. My question is if you understood the term as I used it.

Mr. Dumett: I think it would be better to let him answer it and if it is not proper I will concede it be stricken.

The Court: I think the objection should be sus-

(Testimony of John Alden Towers.)

tained. The Court has directed that in fairness to the witness you state what you mean by two risks, by naming the two you have in mind when you say two, so your question will contain the statement.

Mr. Dumett: I think in fairness to the witness if Mr. Cook would specify in his assumed facts that he is asking the witness to assume—the difficulty is it is too vague—if he would ask the witness in the assumed facts to assume two risks, A and B, the witness might have a better understanding of it.

Mr. Cook: Strike the question.

Q. (By Mr. Cook) Assume that this bridge was actually underwritten by the Northwestern as two separate risks, as that term is used in the insurance world, meaning to me, at least, two units of [208a] that property subject to a single loss from one cause, then in that event under the practice in the insurance world would the existence of Plaintiff's Exhibit No. 1 have to be considered by the Northwestern in reporting their net retention?

A. My answer is yes, because of the two units are subject to the same loss in one occurrence the existence of this excess reduces the ultimate net line, because they must be considered together. There is a certain good faith between companies as to underwriting practices. The Northwestern and the Union Mutual having dealt for years——

Mr. Cook: I submit the witness is arguing the merits now.

A. The answer is yes. I was only explaining for your benefit, Mr. Cook.

(Testimony of John Alden Towers.)

Q. (By Mr. Cook) The basis of your answer is yes, as I understand you, because both units were subject to the same loss event?

A. That is right.

Q. Is it not a fact that in designating separate risks in a property it is done on the basis that each risk is not subject to the same loss event?

A. That is right.

Q. If this bridge then is underwritten as two risks it is underwritten because in the judgment of the underwriter each unit is not subject to the same loss event, is that not true?

A. If it was so underwritten, but your question put to me was the two units were subject to the same.

Q. You misunderstood me, I believe. I meant to say they were not subject to the same loss event.

A. Will you re-read that question, please?

(The reporter thereupon read the question as follows, to-wit:

Q. "Assume that this bridge was actually underwritten by the [209] Northwestern as two separate risks, as that term is used in the insurance world, meaning to me, at least, two units of that property subject to a single loss from one cause, then in that event under the practice in the insurance world would the existence of Plaintiff's Exhibit No. 1 have to be considered by the Northwestern in reporting their net retention?")

Q. (By Mr. Cook) My thought was using the word "risk" in its accepted sense in the insurance

(Testimony of John Alden Towers.)

world, where each risk is subject to a loss by one cause.

A. In other words the two risks are not subject to the same loss?

Q. That is right.

A. That would reverse my answer.

Q. In other words, under that set of facts, in the accepted practice of the insurance world, it would not be necessary for the Northwestern to consider Exhibit No. 1?

A. Mr. Cook, I must again say in the accepted practice of the insurance world if the same peril is expected to involve all of the units, as you put them in the property, then for that purpose they are one risk; and, therefore, I must say that that would not be the accepted practice.

Q. But the basis of my question, Mr. Towers, was that the two risks were not subject to the same loss.

A. If they are not then my answer is there would be necessity—technical necessity—for reporting the existence of Exhibit No. 1,—I think you called it.

A. Will you refer to Article 8 of the treaty between Northwestern and the Union. Do you find there in that contract this provision: "Provided, one, the judgment of the reinsured company as to what constitutes one risk is to be binding on the reinsuring company." Do you see that provision?

A. It is quite a normal provision, yes, sir. [210]

Q. That is what I was going to ask you. Is it not

(Testimony of John Alden Towers.)

customary for such a provision to be included in reinsurance treaties such as this one?

A. That is correct.

Q. (By Mr. Cook) Mr. Towers, I have just a few additional questions. Do you recall the illustration which counsel gave you concerning first the Tacoma Narrows Bridge and then Bridge B, upon which identical policies had been issued, and then in his third assumption there was a third bridge, with an identical policy? A. Yes.

Q. And I believe you stated under those circumstances the net retention of the Northwestern would not be changed or affected by reason of the fact that there were the three bridges, is that right?

A. In so far as the pro rata treaty between the Northwestern and the Union was concerned, that is correct.

Q. And the reason for that, as I understood it, was because there were three separate risks involved? A. Yes.

Q. Now let me ask you to assume in that same situation instead of the net retention being \$50,000.00 that it was \$25,000.00, then in that event in reporting their net retention to the reinsuring company would it be necessary for the Northwestern to consider the existence of Plaintiff's Exhibit No. 1, which is the Lloyd Policy?

A. Considering the same three separate bridges as the example?

Q. Yes, sir.

(Testimony of John Alden Towers.)

A. I would repeat that according to the custom it would not be necessary.

Q. And the reason for that is that there were three separate risks [211] involved?

A. That is correct. But I say also that normally it is—I will not say normally, but I will say that often the treaty makes mention of catastrophe coverage. Technically it is another thing. My answer is custom and practice.

Q. And your custom and practice is that it would not be referred to?

A. No. Technically as the excess cover would reduce the loss through a pro rata proportion it would be my opinion, and that is why we advise clients to mention such coverage that it would affect the net loss, but that is not the custom.

Q. I suppose you would say the Plaintiff's Exhibit No. 1 might reduce the loss but would not affect the retention, is that right?

A. That is correct. It reduces the maximum that a company can sustain in any one occurrence, and indirectly affects the net retained line, but companies have in so many instances waived that question that I would say it is common practice not to object to catastrophe coverage.

Q. Now referring to the question of premiums on various kinds of policies, is it not a fact that premiums on excess of loss contracts, as an ordinary thing, are affected by the loss experience of the company?

A. We have many both ways. We have what is

(Testimony of John Alden Towers.)

known as the flat rate, and we have some that are not even a rate. The premium is not developed by a rate applied to the premium income of the company. It is a flat agreed annual premium. That is a rather unusual type. I would say not over five or ten per cent. of our covers are on that basis. I would say that probably thirty or forty per cent. today are on the flat rate basis and that the balance, which is the majority, are on the fluctuating rate basis determined by the loss experience. [212]

Q. May I ask you now in answering that question, having in mind the distinction which you have made between an excess of loss contract and a catastrophe contract, do you have that in mind?

A. No, I had in mind excess of loss. Catastrophe covers are usually either flat annual premium contracts, or flat rate contracts.

Q. That is the point I was interested in. There is a distinction between what we have been talking about as excess of loss contracts and catastrophe contracts.

A. Of course, the premium—the method of calculating the premium would not be a guide as to the type of cover, because originally we charged a percentage of the excess premium on each and every risk. For example, if the retention was \$30,000.00 and the amount of liability was \$100,000.00 the reinsured would pay some agreed percentage of the top \$70,000.00 premium—that is, for the portion upon which it was liable, but that involved a great deal of detailed calculation, it became cum-

(Testimony of John Alden Towers.)

bersome, and these ways were devised to simplify the accounting end, making it a wholesale method of operation, and at that time we named flat rate premiums applying to the whole premium income, because the whole premium income must be reported to the State, and it was very simple for a company to advise us of their premium income and apply this rate to it. So that is the main modern method.

Q. Is it a fair statement to say that as a general rule the premium on catastrophe contract is a flat rate or a specified form?

A. Not as a general rule. We have many that are flat rate—annual contracts. The fluctuating rate contract is normally a term contract or a continuous contract. The annual contract may have also a fluctuating rate, but is normally a flat rate contract. [213]

Those which do not have the flat rate provide that the rate shall increase retroactively for the period the contract was in force, if the losses exceed a certain percentage of the premium. I mean that is the normal way.

Q. You are speaking now of catastrophe contracts as distinguished from excess of loss contracts?

A. No. I am still speaking of excess of loss.

Q. You must have misunderstood my question. It was directed wholly to the catastrophe contracts.

A. Catastrophe contracts as such are usually annual contracts; annual sometimes plus odd times to bring about an expiration date for the year-end.

(Testimony of John Alden Towers.)

And they are usually on a flat rate basis or a flat premium basis.

Q. At a specified sum for the period?

A. Yes, sir.

Q. And Plaintiff's Exhibit No. 1, this Lloyd Policy, do you have a flat rate on a specified form?

A. That is right. It is an annual contract with a flat rate adjustment.

Q. I believe you stated that had the Union Mutual known of the existence of this Lloyd Policy, Exhibit No. 1, they would have done one of two things, either reduced the amount they would accept, or protect themselves by proper ceding off to other companies?

A. I said that was my opinion of a customary procedure.

Q. Yes. Did you know that the Union Mutual carried an excess of loss policy, beginning at \$15,000.00?

Mr. Dumett: I object to that as being improper cross examination and not relevant to any issue in the case. What the reinsurer may have carried is not material to this issue.

The Court: You mean the Union Mutual? [214]

Mr. Cook: Yes, Your Honor. I meant to inquire further whether that fact would have any bearing on the opinion which he expressed.

The Court: The objection is overruled.

Q. (By Mr. Cook) My question is whether or not you knew that the Union Mutual did at this

(Testimony of John Alden Towers.)

time carry an excess of loss contract, with an attaching point of \$15,000.00?

A. I think they did not, except as regards one peril.

Q. Was that wind storm? A. Wind storm.

Q. If that is the fact that they did carry such a policy, would that have any effect on the answer which you gave as to what they probably would do?

A. I read the testimony of Mr. Legris, and according to that testimony they reinsured specifically in this case down to \$15,000.00.

Q. Yes.

A. If they reinsured down to \$15,000.00, believing—I say if they did—and if they believed the Northwestern would have had \$50,000.00 net, it would seem logical to me they would have reinsured down to say \$9,000.00, had they thought the Northwestern had \$32,000.00, but that again is only a logical conclusion.

Q. That is just your surmise based upon what you know about it? A. That is right.

Q. They were, according to Mr. Legris, reinsured for everything above \$15,000.00?

A. I think that is what his testimony read.

Mr. Cook: I think that is all.

Redirect Examination [215]

By Mr. Dumett:

Q. Mr. Towers, counsel in his cross examination asked you, if I recall the question correctly, to de-

(Testimony of John Alden Towers.)

fine, if you could, a single risk. My memory of your testimony was you said it was difficult in the insurance world to express a definition of a single risk. You did mention though the definition which met apparently with your approval, defining what more than one risk was, and my recollection of your testimony that being more than one risk means two properties unlikely to be affected in the same storm—I presume that would be two or more properties unlikely to be affected on the same risk. Have you in your experience in the insurance business had come to your attention any other definition of that term with an authoritative background?

A. May I correct you? I said I arrived at a definition which was satisfactory to Lloyd's underwriters and accepted by them. I don't like it myself very well. [216]

Q. Yes; that is what you said.

A. Yes. I have read a definition of one risk which was prepared from a source as authoritative as I know of, a consensus of opinion source, from questionnaires.

Q. Does it come anywhere near what you think the proper definition is?

A. It is as good as I could do, but I don't think anyone can do very well on it.

Q. Give us that.

A. "The same risk refers to one fire area and not to the probable maximum loss. For instance, the probable maximum loss on a fire resistive building might be 50% but the building might be all one

(Testimony of John Alden Towers.)

fire area. In such a case the building would constitute one risk."

Q. What is the authority for that definition?

A. That is a definition prepared by Mr. Green, who is secretary and lawyer, I believe also, for the Federation of Mutual Fire Insurance Companies, which is an association that most of the mutuals, including these two parties, belong to. [216a]

Q. (By Mr. Dumett) Let me ask this question. Do you recall a question you were asked on cross examination with respect to what would be customary in the event the Northwestern had underwritten this bridge as two risks, in which your answer was interrupted? Do you recall the occasion?

A. I recall that that question was asked, but I don't remember what question it was, that I was not permitted to finish.

Q. The question, I believe, was assuming that the Northwestern had underwritten this bridge as two risks, and in view of the treaty in suit.

A. Yes, sir; I think that was the question.

Q. (by Mr. Dumett) Under the customs and usages of the insurance [216b] business and in view of the terms of this Union-Northwestern treaty, does the ceding company, under such a treaty, customarily or necessarily ask its reinsurer for special authority to exceed the one-risk limit, if it considers the insurance strictly as involving two or more risks?

A. It would not be necessary to ask for special permission to write more than \$25,000.00, unless

(Testimony of John Alden Towers.)

the ceding company felt they were exceeding the limit named in the contract, which is \$25,000.00 on any one risk.

Mr. Dumett: I think that is all.

Recross Examination

By Mr. Cook:

Q. You referred to a definition of one risk as being the same risk referring to one fire area. Will you concede there may be more than one fire area in a single building?

A. Yes, sir. According to this definition that was read, regardless of the number of fire areas the whole building is considered one risk. Now I read that because that is the consensus of opinion of others. I might not personally agree with it.

Q. Let me ask you this. Is it in your judgment the consensus of opinion in the insurance fraternity there may be several risks in one building, several individual risks, as we speak of it?

A. From the fire standpoint, yes; from an earthquake standpoint, no; from collapse, no. That is the thing. That is why it is impossible to define, in my opinion, one risk.

Mr. Cook: That is all.

Mr. Dumett: That is all. [217]

Thereupon, counsel for the Defendant offered Defendant's Exhibits A-14, A-15, A-16 and A-17, and the same were received in evidence.

Mr. Dumett: I have not further witness, but I

(Testimony of John Alden Towers.)

wish to present a small amount of documentary proof.

If the Court please, and counsel, I have had marked for identification three documents. The first, identified as Defendant's Exhibit A-14, is an exemplified copy of the report of examinations of the Northwestern Mutual Fire Association of Seattle, and on the authority of the National Association of Insurance Commissioners, under date of December 31, 1938. The copy is exemplified in accordance with the rules of civil procedure, certified by the Insurance Commissioner of the State, and exemplified by the Secretary of State under the seal of the Secretary of State, complying strictly with the rule in that respect, which makes its identification complete on being so exemplified. The exemplification sets forth that it is a copy of the original record in the office of the Insurance Commissioner and he has custody of it.

Exhibit A-15 is an exemplified copy, exemplified in the same manner, the report of the examination of the Northwestern, bearing date December 31, 1939, by the Insurance Commissioner of the State of Washington; and the third document identified as Defendant's Exhibit A-16 is a further exemplified copy, exemplified in the same manner, of the report of examination of the Northwestern Mutual Fire Association, bearing date December 31, 1940, by the Insurance Commissioner of the State of Washington; all three documents being official records of his office.

(Testimony of John Alden Towers.)

A word of explanation of the purpose of such records. These are three documents which speak for themselves, and they are offered in connection with the rebuttal or surrebuttal of the Defendant on this question [217a] of custom and usage, and bears on the testimony of Mr. John F. Sullivan one of the witnesses called as an expert by the Plaintiff, and who, over the objection of the Defendant, was permitted to testify as to custom and usage as bearing upon the issues in this case.

Now then these reports, which are tantamount to the originals themselves, exemplified as they are, and which were specifically referred to by Mr. Sullivan, are offered for the purpose of proving that Mr. Sullivan's testimony is utterly without basis.

Mr. Sullivan was very much mistaken. These reports, according to my reading, and if I am incorrect it can be readily shown by the documents themselves, according to my reading there is not a word in any of these documents that bears out what Mr. Sullivan said.

There is no reference to terms of excess or catastrophe cover, and since that was a part of his testimony bearing on custom and usage, it is important to show Mr. Sullivan was entirely mistaken, and the reports do not contain what they say they contain, and I offer the documents themselves with that explanation. [217b]

The material parts of these exhibits were as follows:

(Testimony of John Alden Towers.)

DEFENDANT'S EXHIBIT A-14:

This is the report of an examination of the plaintiff Northwestern Mutual Fire Association for the period ending December 31, 1938, made by examiners from the Insurance Departments of the States of Washington, North Carolina, Georgia and Oregon.

(Original exhibit sent up—Clerk.)

DEFENDANT'S EXHIBIT A-15

This exhibit is a report of examination of the plaintiff Northwestern Mutual Fire Association for the period ending December 31, 1939, made by the Department of Insurance of the State of Washington.

Reinsurance

(Original exhibit sent up—Clerk.) [218]

DEFENDANT'S EXHIBIT "A-16"

This exhibit is a report of examination of the plaintiff Northwestern Mutual Fire Association for the period ending December 31, 1940, made by the Department of Insurance of the State of Washington.

Reinsurance

(Original exhibit sent up—Clerk.)

(Testimony of John Alden Towers.)

DEFENDANT'S EXHIBIT "A-17"

(Original exhibit sent up—Clerk.)

This exhibit consists of various reports of re-insurance placed in the years 1939, 1940 and 1941 by the plaintiff with the defendant upon printed forms identical with printed forms used in defendant's Exhibit "A-5". The material items of these cessions are as follows:

Amount Ceded:	Retention by plaintiff:	P.M.L. %	Number of Separate locations of property insured:
\$ 5,400	30,800	33	17 (separate schools)
20,400	60,000	37	8 (separate schools)
(M26,000 A19,542)	M63,000 A47,250)	22	27 (in 12 towns)
13,330	66,649	26	22 (Including 16 separate schools)
(M 2,500 A 2,222)	M20,000 A17,776)	44	5 (in 5 towns)
(M10,000 A 2,850)	M50,000	23.3	10 (in 5 towns)
20,000	50,000	20	12 (in 12 separate schools)
15,000	21,000	6	31 (in 24 towns)
40,000	40,000	13	17 (in 17 towns)
5,000	50,000	50	12 (in 2 cities)
15,000	36,500	60	22 (in 16 towns)

Plaintiff's Surrebuttal Evidence

JOHN J. BEALL,

called as a witness by the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cook:

Q. I hand you Defendant's Exhibit "A-17", and I will ask you to examine it. Are those cessions of insurance to the Union made by the Northwestern? A. They seem to be.

Q. And in each case do they cede to the Union insurance in excess of the \$25,000.00 limit provided in Article 8 of the treaty?

A. I think they do not. Those I have seen so far do not. Here is one in excess of \$25,000.00 (indicating).

Mr. Dumett: What is the number of that?

The Witness: That is No. 12505.

Q. (By Mr. Cook) And that cedes to the Union \$40,000.00 worth, is that right?

A. That is right.

Q. And the Northwestern retains identical \$40,000.00, according to that cession?

A. That is right,—and \$61,000.00 on the stock.

Q. Does that cession of \$40,000.00 cover more than one individual risk? A. Yes.

Q. How is the Union advised by that cession that that \$40,000.00 ceded to them, which is in excess of the \$25,000.00 limit, [220] covers more than one individual risk?

(Testimony of John J. Beall.)

A. By a P.M.L. showing of 13%.

Q. Can you explain that in any other way or any more fully to the Court?

A. I am not sure I understand the question, but——

The Court: Can you make it plainer, Mr. Cook?

Q. (By Mr. Cook) I would like to have you explain, if you can, more fully how your estimated 13% P.M.L. on that report 12505, Exhibit A-17, notified the Union Mutual that more than one risk is involved in this cession of \$40,000.00?

A. The underwriters who passed on this particular policy submitted the maps and the reports and reached the conclusion not more than 13% of the total values covered were concentrated in a single area.

The Court: In what?

The Witness: In one fire area.

Q. (by Mr. Cook) That appears to be the only one of those many dailies which involves a cession of more than the \$25,000.00 limit, is that correct?

A. Yes, sir. From a hurried look at it.

Q. If you will refer to cession No. 10024, which is the second sheet of that Exhibit A-17, I notice some values placed after description of specific property. What is the purpose of that?

A. It shows the limit of liability under our policy in each of those risks.

Q. Does that limit of liability in dollars there attributed to these various properties have anything to do with the reinsurance of individual risks?

(Testimony of John J. Beall.)

A. No, sir. It has in the whole study of the share of values concentrated in a single risk. Two of the risks might be in the same fire area. [221]

Q. In all of those sheets comprising Exhibit A-17 is there any other method used by the Northwestern in designating the number of risks involved? A. No.

Q. Than by the use of the P.M.L. A. No.

Q. How many years have you and the Union done business under a treaty similar to this?

A. The contract was arranged in 1925. I am pretty sure of that.

Q. That is a matter of some 17 years?

A. Yes, sir.

Q. During the course of those 17 years has the Northwestern ever used any other method than by using the P.M.L. estimate to advise the Union of the number of risks involved?

A. Never any other method.

The Court: Never any other method than what method?

The Witness: Than the P.M.L. estimate.

Q. (By Mr. Cook) During those 17 years did the Union Mutual ever use any other method of advising Northwestern of the number of risks involved on business ceded to the Northwestern than the P.M.L. estimate? A. Never.

Mr. Dumett: I again object to that as not being proper surrebuttal, having been gone into fully in their case in chief, and having no relation to any new matter brought out by us.

(Testimony of John J. Beall.)

The Court: The objection is overruled.

Q. (By Mr. Cook) Your answer is what?

A. My answer is never.

Mr. Cook: That is all.

Cross Examination [222]

By Mr. Dumett:

Q. Now with respect to Daily Report 12505 in Exhibit A-17, that particular Daily Report which you referred to covers, does it not, seventeen different towns and villages?

A. That seems to be the number.

Q: About seventeen different towns and villages located where?

A. At various places in the State of Washington.

Q. And that is a certificate of reinsurance that cedes how much? A. \$40,000.00.

Q. Is it not correct to say that where you have a certificate covering properties in seventeen different towns that there are seventeen different risks involvd?

A. It certainly is highly likely.

Q. And if there were seventeen different risks involved and if the probable maximum loss was the method used to designate the number of risks, the percentage should be 5.7, should it not, instead of 13%?

A. Not at all. The values would not be the same in each case. You might have seventeen different locations in a 99% P.M.L., if 99% of your values were in the same area.

(Testimony of John J. Beall.)

Q. But if you had seventeen different risks, seventeen divided into one hundred would be 5.7?

A. I haven't made the calculation.

Q. I think it is roughly that. And if P.M.L. is the term used to designate the number of risks, and assuming that I am right, that 5.7 is the decimal equivalent of 117, why would you not say it was 5.7 instead of 13?

A. The percentage of the number of risks has no particular bearing.

Q. Then why do you not follow the custom if you are trying to indicate by P.M.L. to your reinsurer the number of risks, why [223] do you not follow the custom of simply stating in your daily report there are seventeen risks? Would it not be simpler?

A. The other is the time hallowed custom.

Q. But would it not be simpler and clearer if you would say, instead of using this method, there are seventeen risks, to your reinsurer?

A. I don't think so.

Q. Or if you had a structure where there might be some question whether it involved one risk or two risks, would it not be simpler and clearer to state on the daily report two risks?

A. The percentage is so simple. We say 50% and 50% or 50% is \$25,000.00. It is simple.

Q. Take 9108 you have there. You give the P.M.L. there of 33%?

A. Yes, sir. With seventeen risks.

(Testimony of John J. Beall.)

Q. And there you have seventeen different risks?

A. It would help if—may I speak?

Q. I would prefer that you answer my question.
A. It might show 100.

Q. In 9442 the P.M.L. is 37%?

A. Yes, sir.

Q. And it covers eight separate items.

A. Not on my sheet. I have a blanket of buildings and contents.

Q. How many school buildings?

A. It doesn't show, unless it is on the back. Oh, here is an endorsement. I see it on the endorsement.

Q. The schedule shows eight different school buildings or items?
A. That is right.

Q. And No. 10024 you show the P.M.L. of 22%?

A. That is right.

Q. And you have there twenty-six stated locations in twelve different towns? [224]

A. I haven't counted them. I will take your word for it.

Q. No. 10870 P.M.L. 26% .

A. That is right.

Q. And it covers 22 items in at least sixteen towns?
A. I haven't counted them.

Q. Is that approximately correct?

A. That is probably right.

Q. And turn to 13486, the last one.

A. Yes, sir.

Q. P.M.L. 60%?

(Testimony of John J. Beall.)

A. It is indistinct here, but I think that is what it was.

Q. It covers there 21 locations in 16 towns?

A. I have 22 items.

Q. Is there a schedule there showing the items?

A. There is a schedule.

Q. Of course where you have a schedule attached to a daily report that lists items in 17 different towns, that clearly, on the face of it, is an indication of the severability of risks, is it not?

A. Yes.

Q. And isn't that commonly done to have schedules attached to daily reports or certificates of reinsurance or bordereaus that show listing of the articles and also shows the number of risks?

A. That is not customary. If the form attached to our policy includes a schedule it goes on here, but if a form attached to our policy covers the policy blanket we put in the blanket, and that is the custom and usage. This is not for the purpose of informing the reinsurer of the P.M.L., but is a synopsis of the forms attached to the policy. It has a different purpose than the P.M.L. [225]

Mr. Dumett: I believe that is all.

Redirect Examination

By Mr. Cook:

Q. You wished to make some explanation on this P.M.L.?

A. That was an explanation that all of this below the line has no reference to the P.M.L. estimate. This is an estimate or synopsis attached to

(Testimony of John J. Beall.)

out policy, and is not information to the reinsuring company of the number of risks involved.

(Witness excused.)

FELIX F. KURZ,

called as a witness by the Plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cook:

Q. State your name, please.

A. Felix F. Kurz.

Q. Where do you live, Mr. Kurz?

A. Seattle.

Q. What is your business? A. Insurance.

Q. With what particular company are you connected?

A. The General Insurance Company of America.

Q. How long have you been connected with the General Insurance Company of America?

A. Twenty years,—the life of the company.

Q. You were one of those who organized the company or you were there at that time?

A. I was there at the organization time. [226]

Q. What particular position do you hold now with the General? A. I am vice-president.

Q. And you have been vice-president for how long? A. About nine years.

Q. What duties do you have in connection with

(Testimony of Felix F. Kurz.)

your employment by the General Insurance Company of America with reinsurance contracts and treaties?

A. I handle and advise the making of contracts.

Q. Is it proper to say the reinsurance part of the General Insurance Company's work is under your supervision?

A. Yes, sir.

Q. How long has that been true?

A. About ten years.

Q. Will you tell the Court the meaning in the insurance world of one risk, when we speak of an individual risk, or one risk or two risks or three risks? [227]

Mr. Dumett: I wish to make an objection at this time. I respectfully submit to Your Honor this is going beyond the range of propriety on the part of the Plaintiff and is unduly lengthening this case.

All of these matters relating to definitions and custom and usage were gone into by them very fully and at length in their case in chief, and the only reason for the continuance of the trial was to permit us, after they had amended their pleadings, to bring this issue in to meet the testimony they had put on.

What Mr. Cook is attempting to do now with a new witness is to go into exactly the same matter he went into with three expert witnesses in this case, and I submit it is not now proper to re-open that and go into it with a new witness, because all those matters were thoroughly covered before. I think it is improper and I think the objection I make now is sound.

(Testimony of Felix F. Kurz.)

The Court: In view of the fact the objection goes to the Plaintiff's counsel at this time going into the same subject you went into in the deposition, and with the witness Towers, your objection is overruled. If the scope exceeds that I will hear from you further.

Mr. Cook: I do not intend to go beyond that.

[227A]

A. The term "Risk" is used in two cases in the insurance business. First from the standpoint of an agent presenting a risk to his company. He refers to a line of insurance which may be on one building or a group of buildings or a manufacturing plant, or it might be a schedule of buildings.

Then we use the term "risk" in another sense when we use it in reinsurance contracts, because we want to place a specific limitation of liability that we will accept from another company, and we use the term "risk" in a narrower sense as the amount subject to one loss.

Q. (By Mr. Cook) What part has the term "P.M.L.", as used in the insurance world, to do in determining the number of risks involved in reinsurance cessions?

Mr. Dumett: I make the same objection, and may it be understood—I don't want to break in unduly—but may I [227B] have an objection to all these questions, on the ground that they are not proper sur-surrebuttal and were all covered in the case in chief? As to any new matters I may have

(Testimony of Felix F. Kurz.)

brought out, that is something else, but this would cover it.

The Court: The objection is overruled. Do you consent that counsel have this arrangement?

Mr. Cook: Yes, Your Honor; that is agreeable to me.

The Court: The Court consents to that. You may proceed.

A. In reinsurance contracts or in the exchange of reinsurance, it is usual to refer to risk as the amount subject to one loss.

Q. I will re-ask the question. Can you give any examples of what constitutes one, two or three risks, as used in reinsurance treaties, before we go into the next phase?

Mr. Dumett: That is objected to as going beyond the scope of the issue here.

The Court: Overruled.

A. An individual frame dwelling, for example, would be a risk. I am using the term "risk" from a reinsurance standpoint.

If we cover two such dwellings and they were ten feet apart, and without much or any public protection, they might still be one risk.

As the distance between those dwellings increases the judgment of the underwriter enters into it, at what point the one risk becomes two risks.

Q. (By Mr. Cook) Is it possible or usual to have more than one risk in the same structure?

A. Yes; it is possible—not usual, because it de-

(Testimony of Felix F. Kurz.)

pend on the type of construction and the type of the risk.

Q. Can you give us some example where there would be more than one risk in the same individual structure?

A. The example Mr. Towers gave this morning I think is a good [228] example—a 44-story fire-proof building would be a multiple risk. As to how many units would depend upon the judgment of the individual underwriter.

Q. Incidentally, did the General Insurance Company also have some insurance on the Tacoma Narrows Bridge? A. Yes.

Q. Will you tell me what the General wrote the Tacoma Narrows Bridge at?

Mr. Dumett: That is objected to as not within the proper scope. That is going into a collateral issue and trying to go into some other case, how it was treated, and why it was so treated is beyond the scope of the sur-surrebuttal.

The Court: The objection is overruled.

A. The number of bridges in the country is on the whole limited, as far as large structures are concerned, and consequently the judgment of the underwriters is not perhaps as mature as it would be in other fields.

This particular bridge was submitted to our company and it was carefully reviewed, and it was our opinion it was some approximately 50% subject, and our net retention was predicated on that basis.

(Testimony of Felix F. Kurz.)

After the collapse, because of that experience, we have changed our ideas, but that was our sincere opinion.

Q. (By Mr. Cook) You have used the term "50% subject." Is that synonymous with 50% P.M.L.?

A. Yes, sir. We use it in our company in the same manner the Northwestern apparently uses the term P.M.L.

Q. 50% subject and 50% P.M.L. mean the same thing? A. Yes, sir.

Mr. Dumett: You mean in the practice?

The Witness: Yes, sir; and with many companies with whom [229] we deal. I think stock companies use the term subject, or the Mutuals use the term P.M.L.

Q. (By Mr. Cook) Referring to this bridge as being 50% subject, or having a 50% P.M.L., what would that indicate in the insurance world as to the number of risks involved?

A. We were thinking of that as two risks—as we saw the probable maximum loss was 50%.

Mr. Kurz, I hand to you here Defendant's Exhibit A-2, which is a photostatic copy of a telegram from Northwestern to Union, which reads: (Reading)

"Please refer our letter May 31, Washington Toll Bridge Authority contract, Tacoma Narrows Bridge. Further information just received indicates P.M.L. about 50%. We will

(Testimony of Felix F. Kurz.)

retain \$50,000.00. Please wire your authorization."

Considering that telegram and P.M.L. estimate, what in the insurance world would that indicate to the Union as to the number of risks involved?

Mr. Dumett: I object to the form of that question. May I ask some questions on voir dire to see if he is qualified to answer?

The Court: Yes; you may do so.

Cross Examination

By Mr. Dumett:

Q. Counsel read from the wire and asked what that would mean in the insurance world. I understood you to testify a moment ago what your practice was. Do you know of a uniform custom in the insurance world that would bear on the interpretation that the Union and other companies would place upon a term of that kind? Have you the facts to answer that question of your own knowledge?

A. I have been in this business twenty-five years, and for twenty [230] years I have been an underwriter, and I would say that an underwriter who has had even a few years experience would immediately consider the amount subject, when it was so indicated, either the amount subject or P.M.L., as indicating what was the probable maximum loss, and consequently it indicates the unit or risk subject to the particular hazard.

(Testimony of Felix F. Kurz.)

Mr. Dumett: That is all on voir dire.

The Court: The objection is overruled.

Direct Examination (Resumed)

By Mr. Cook:

Q. Will you now answer the question I asked you, what information this would convey, using the accepted term—the accepted meaning of the terms in the insurance world as to the number of risks in this certificate?

A. It would indicate to an underwriter there were two risks.

Q. And handing you Defendant's Exhibit A-5, which is a photostatic copy of the actual cession or daily, will you state whether or not that also would give the same indication as Defendant's Exhibit A-2, about which you have just testified?

A. The daily report indicates P.M.L. 50%, and it would give the same interpretation or impression.

Q. That there were two risks involved?

A. Yes; that there were two risks involved.

Q. May I ask you this one general question? Can you tell us what the practice is in the insurance world in general, among companies, of the manner and how they indicate to their reinsurers the number of risks involved?

A. By giving either the amount subject or the P.M.L., to the best of my knowledge.

The Court: By that alternative phrase you mean the same idea? [231]

The Witness: Yes, sir.

Mr. Cook: That is all.

(Testimony of Felix F. Kurz.)

Cross Examination

By Mr. Dumett:

Q. Is it not also common practice for reinsured companies to advise their reinsurers of the number of risks involved by schedules, which would show on their face the severability of the risks, such as properties in various towns?

A. Not necessarily. We write lots of insurance where we declare the reinsurance simply stating various towns or locations in Washington, or various locations in the United States. It might mean three or one hundred locations. We don't designate the number.

Q. The question is not whether it is necessarily done, but it is done?

A. It might be done, but it is not customarily done, to the best of my knowledge.

Q. You have seen it done, however?

A. Yes. Although where I have seen it done it is usually incidental, because no underwriter cares to know the number of risks without knowing the probable amount subject.

Q. Handing you Plaintiff's Exhibit No. 2 for identification, one of the exhibits in this case, Mr. Kurz, a certificate of reinsurance from Union to Northwestern, with schedule attached, that schedule shows, does it not, properties in various locations in certain southern states?

A. Yes, sir; it does. This is a general form or schedule.

(Testimony of Felix F. Kurz.)

Q. Is that commonly used, that kind of a schedule, or frequently used?

A. It is used where the company ceding the re-insurance gives the accepting company, you might say, a copy of the form or a [232] summary of the form.

Q. Showing the various risks?

A. That is right.

Q. Of course it is apparent, is it not, even though you have not seen this before, from that schedule there are a number of separate and distinct risks—properties in separate towns? A. Yes, sir.

Q. And you have seen that done on other occasions, have you not, with respect to large numbers of risks involved in a particular coverage?

A. Yes, sir; I have.

Q. Is that information as to number of risks also sometimes given in what are called bordereaux?

A. I have never seen it.

Q. In your experience you have never seen it?

A. Not in bordereaux.

Q. Have you ever seen the number of risks shown directly or indirectly in bordereaux at any time?

A. No, sir; I haven't. The purpose of a bordereaux is to make it as brief as possible and to summarize things as much as possible, and I don't recall I have ever seen that in a bordereaux.

Q. It would be possible, would it not, to have a one-story building of combustible material with no

(Testimony of Felix F. Kurz.)

firewall or fire stop, yet where the area of the building and other conditions were such that you would show less than 100% P.M.L.?

A. Not without fire stops.

Q. Is it not possible even without fire stops with a building spread over a large area, such as I have described, to have a P.M.L. of less than 100%?

A. No, sir. Not a building of combustible construction.

Q. The only one-story building you know of with regard to the [233] area where you could have less than 100% P.M.L. would be where you have fire stops? A. Yes, sir.

Q. What kind of fire stops?

A. A fire stop would have to be a brick wall with no openings or if there were openings they would have to be protected by standard fire doors.

Q. A very large building, spread over a large area, would not that in itself, in your experience, justify rating it as less than 100% P.M.L.?

A. No, sir; because the larger the area the greater the hazard.

Q. Say a large area spread out, a one-story building, even with no fire stops, is it not less likely that building will be totally destroyed by one hazard than would a much smaller building?

A. No, sir; that is not so. In fact with such a building, it would add to the rate, because of the large area.

Q. Your definition of one risk was amount subject to one loss? A. That is right.

(Testimony of Felix F. Kurz.)

Q. Amount subject to one loss. Now the Tacoma Narrows Bridge, do I understand you that you consider it involved more than one risk?

A. Yes, sir; we did.

Q. And your company had a million dollars on the bridge? A. A million dollars gross.

Q. Do you know the Hartford wrote about \$100,000.00 gross on it?

A. I don't recall what the other companies had.

Q. Assume I am right, the Hartford is a much larger company than the General?

A. Yes, sir.

Q. Would that not indicate to you a company like the Hartford [234] considered it as one risk or considered it quite a hazardous risk?

A. Not necessarily. It might.

Q. When you say your company considered this Tacoma Narrows Bridge as two risks, do you mean you considered the bridge itself as two risks?

A. Yes, sir.

Q. This Tacoma Narrows Bridge, across the Tacoma Narrows, was a suspension bridge?

A. Yes, sir.

Q. You considered it as two risks. Do you mean you considered it in the same category you would consider two separate buildings far removed from one another, so one would not be involved in a hazard to the other?

A. Well, practically so, yes. In fact we perhaps made a little allowance for the fact it was one

(Testimony of Felix F. Kurz.)

structure, and consequently we were liberal when we estimated 50%.

Q. You say in estimating it at 50%, what do you mean by that?

A. Actually when we have a component unit of the same structure, as for example this bridge, or a fireproof building, we do not divide it down quite as finely as we would if each of those units was distinctly and definitely separated.

In this case the bridge had several piers, it had approaches, it was supported by cables, and at the time we underwrote that bridge we thought at the very most 50% would represent the maximum loss.

Q. Wasn't it your opinion that no matter what hazard or catastrophe occurred that the bridge would not be totally destroyed, but the worst that would happen to it it would be 50% destroyed?

A. Yes, sir.

Q. Wasn't that really an estimate of the probability of the amount [235] of loss in the event of any storm hazard? A. Yes.

Q. (By Mr. Dumett) And in view of the nature of that bridge, a suspension bridge, with the bridge portion suspended through piers at either end—there were no midstream supports?

A. There were two piers.

Q. Two piers at either end? A. Yes, sir.

Q. And the bridge was suspended between the piers on cables? A. Yes, sir.

The Court: There were one or more piers in the middle of the stream. They stood there for months.

(Testimony of Felix F. Kurz.)

Mr. Dumett: You may be right, but anyway it was a suspension bridge, with the bridge proper suspended on cables through piers.

The Witness: On cables.

Q. (By Mr. Dumett) Supported by cables which were attached to the piers? A. Yes, sir.

Q. Is it not true in considering that bridge as the subject of insurance that the hazard from collapse of the bridge as a whole was not considered at all?

Mr. Cook: I object to that for this reason: That that goes to the quality of a man's judgment, which is no defense in this case. All we are called upon to do is to exercise our good judgment as to how many risks that bridge presents. This goes to whether we were right or wrong.

When Mr. Beall was on the stand he testified he thought it was two risks, and he was asked, "Experience shows you were wrong?", and he said, "No, I still think I was right, because the piers were still standing there after the collapse was [236] over, and still undamaged by the collapse."

Mr. Dumett: I will ask another question in its place. Can you, Mr. Kurz, tell us just what were the two separate risks involved, in your opinion, as an expert? Can you break down or segregate it?

The Witness: At the time we had the values submitted we had it broken down as to the values between the two piers and the approaches on either side and the value of the balance of the structures. The piers were very expensive, the installation cost being particularly high.

(Testimony of Felix F. Kurz.)

Q. (By Mr. Dumett) Is that as near as you can come to defining what separate units or risks there were in that structure as a whole?

A. Yes, sir; that is my recollection at the moment.

Q. And it was on that that you based the statement as to the two risks? A. Yes, sir.

Q. Although it was all one physical structure?

A. That is right.

(Witness excused.) [237]

Mr. Dumett: As Mr. Cook says, in accordance with our agreement which we stated before, we would have this testimony transcribed, like the other testimony was, at our joint expense, and a copy furnished the Court.

Thereupon both parties rested from the giving of evidence. Whereupon the case was continued to June 14, for the purpose of submission of briefs and oral argument at that time.

Be It Remembered, that heretofore and on to-wit June 22, 1943, at the hour of 10:00 a. m., the above entitled matter came on regularly for hearing on entry of Findings of Fact, Conclusions of Law and Judgment, before the Honorable John C. Bowen;

Plaintiff appearing by Jo D. Cook, Esq., (Messrs. Shank, Belt, Rode & Cook) its attorneys and counsel;

Defendant appearing by Ray Dumett, Esq., (Messrs. Bogle, Bogle & Gates) its attorneys and counsel.

Whereupon, the following proceedings were had:

[237A]

The Court: I would invite counsel to make known to the Court any points on which they are not in agreement on the propriety of the form of the Findings proposed by Defendant, that is, if there are any such disagreements, as to form.

Mr. Dumett: Yes, Your Honor. I understand Mr. Cook wishes to take up with Your Honor certain objections he has to the form. I don't know just what they are yet, but I presume he will have some.

It occurred to me, Your Honor, that it might be well, before we got in to that discussion, providing it meets with Your Honor's approval, for me to take up first the deposit and tender that I mentioned to Your Honor at the time I appeared in the Clerk's office, I think yesterday. I have advised Mr. Cook about it.

That deposit and tender I hand to the Court, the original. This was served upon opposing counsel on last Saturday morning, I think; and then in this instrument, in brief, what we do there, we say that, although we do not believe we are legally bound to do so, we do now tender and deposit in Court the sum of \$102.60 as a return premium to the Northwestern, on the theory that in view of

the Court's ruling, if the actual amount of the cession is treated as \$32,000 instead of \$50,000, out of an abundance of fairness, we wish to give them credit for any amount in excess of the premium that would have been the premium in the event the reinsurance had been ceded on the \$32,000 basis in the first place.

The reason I make this tender is that during the [238] early stages of the trial, counsel for the Plaintiff raised the point in questioning our witnesses as to whether we had offered to return any part of this premium.

I at that time stated that we had not because we would have to wait for the decision of the Court to determine on what basis the cession was really made; that if it was held that it was made on a \$32,000 basis or some other basis lower than \$50,000, although we felt no legal obligation to do it, yet, in order to eliminate any question about it, that they were entitled to any return premium, we are ready to tender it into Court. I have it on my person now.

The reason that I wish to tender it into Court is that I assume that the Plaintiff and counsel for the Plaintiff will be unwilling to accept it. Their whole theory, of course, is that the cession was on a \$50,000 basis and that they are not entitled to any return premium, and, as a matter of fact, as the record shows, they have given us a notice of no return premium due.

Of course, that is on the theory that there was \$50,000 cession, and I presume, in the event they

want to preserve their record for appeal, they would not voluntarily accept this. If they would, I would give it to Mr. Cook right now; but by tendering it into Court, they don't prejudice any rights they have, nor do I.

I had assumed, I may say,—

The Court (Interposing): What rule do you pro- [239] ceed under?

Mr. Dumett: Rule 67 of the Rules of Civil Procedure.

The Court: You may proceed.

Mr. Dumett: It had been my assumption that here, as in the State courts, this being a voluntary tender, that all I would have to do would be to deposit it with the Clerk; but the Clerk called my attention to the language in the rule, which I had overlooked, that it must be done with the leave of the Court, by leave of Court; and so it is for that reason that I am applying to Your Honor for leave of Court.

I would assume that there is nothing controversial in this particular matter; that if we choose to tender this amount, even though we believe we are not legally liable for it, but in order to remove any possible technicality from the case and leave only the main issue, I presume that there is no controversy and that the Court ordinarily would grant us leave to do that, providing it is done in a way that it does not prejudice or bind the Plaintiff.

The Plaintiff, in other words, doesn't accept it—I assume he won't—but it is tendered into Court for

his use so that, when this case is concluded, it is there.

The form of the tender, as the Court will note, it is a notice to the other party, that the amount is tendered, with authority and directions to the Clerk to hold it for the benefit of the Plaintiff and pay it over to Plaintiff if and when proper receipt is given; and I at this time would like to have the leave of the Court to make that deposit, which I am ready to make now.

The Court: Mr. Cook, did you wish to oppose it or [240] make any statement concerning it?

Mr. Cook: Well, it is a matter over which, of course, I have absolutely no control, Your Honor.

My position would simply be this, that the Defendant cannot, after the Court announces its decision, change its position any by now tendering money; that if any tender was necessary, it would have necessarily had to have been made when they discovered or first contended that their cession had been wrong, that they had been ceded only \$32,000 instead of \$50,000; and there was evidence introduced to the effect that no return had been made of the premium under their theory and no tender of it, and certainly Counsel can't wait until after a lawsuit is over and then tender it, if there is any liability or any right accruing under it.

It is something that I have no control over. I don't intend to waive any rights that I may have, and I proved in the case that no tender had been made of a return premium; and they, of course,

discovered what they contend now several months before the lawsuit was even started, and if a tender was necessary, it certainly should have been made at that time, not now, after decision has been reached in the case.

The Court: What response to that do you wish to make?

Mr. Dumett: In short, Mr. Cook's position, as I assumed it would be, is that he is not in a position, of course, on this sort of an application, to oppose the tender. That is, it is a matter between counsel for the Defendant and the Court, provided, of course, it is understood that he is not accepting it or waiving his rights, [241] and I do not intend to ask him to waive any rights.

The Court: Did you make any foundation in your pleading for this eventuality?

Mr. Dumett: Not in the pleading itself, Your Honor, which we considered then and consider now unnecessary. The suit itself was a suit by the Plaintiff for a definite amount of money which the Plaintiff claimed was the amount that the Defendant owed them by reason of Defendant's share of the loss of the bridge.

We answered, setting forth that the actual amount we owed for our share of the loss of the bridge was less than claimed, because of the cession not being in accordance with the treaty.

Therefore, the controversy in this case was whether our share of the loss on the bridge was the amount the Plaintiff said or what we said. That was the sole controversy. So there was no occasion

in the pleadings to go into this matter at all. In other words, the Plaintiff did not sue or ask for any return premium.

But, however, and as I say, it is my view that there is no obligation on our part at all to pay a return premium. At least, in this case, it wasn't in issue. However, now that the Court has held that the basis of the cession was \$32,000, I would like it to appear of record that, even though we recognize no legal liability, we want to be more than fair on the matter; and rather than wait until the matter is finally concluded, either after appeal or by acceptance of the Court's judgment, we would like to make the tender now and make it here so it will be a matter of record. [242]

Then, if and when this case is concluded, either by the Plaintiff's accepting the Court's judgment or appealing and having it affirmed, if that were the case, that money would be there available for the Plaintiff.

Under the treaty, there is no provision at all for a return of any premium in the event of a case like this. Article XIV of that treaty says that, where the net retention is improperly stated, where they state they are retaining more than they actually did, that the sole remedy to be granted will be a reduction of the net retention under Article XIV.

In other words, there is a penalty on the Plaintiff when it misstates its true net retention, that penalty being a reduction of the amount of the cession to the actual amount without any allowance for return

premium at all. There is nothing in the treaty that says there shall be a return premium.

So it is our legal position that we are not liable for it. But in view of the fact that Plaintiff has raised it, and in order to eliminate any possible technicality, we wish to tender it.

Now, the first time we could tender it, since the Plaintiff was not asking for it and it was not involved in this suit, was after the Court had held what in his opinion the actual net retention was; and it is for that reason that we are making the tender.

I submit that it is eminently proper, it does not prejudice any of the Plaintiff's rights, but it is, we feel, important for our record to show that it was tendered after the amount of the net retention was determined.

The Court: The Court's permission is granted to file this tender and deposit in the Registry of the Court.

Mr. Dumett: Thank you, Your Honor. I will do so right after this hearing. [243]

Copy received Sept. 10, 1943.

BOGLE, BOGLE & GATES.

[Endorsed]: Filed Sept. 10, 1943.

[Endorsed]: No. 10584. United States Circuit Court of Appeals for the Ninth Circuit. Northwestern Mutual Fire Association, a corporation, Appellant, vs. Union Mutual Fire Insurance Company of Providence, Rhode Island, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed October 18, 1943.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals,
for the Ninth District

No. 10584

NORTHWESTERN MUTUAL FIRE ASSOCIA-
TION, a corporation,

Plaintiff,

vs.

UNION MUTUAL FIRE INSURANCE COM-
PANY OF PROVIDENCE, RHODE IS-
LAND, a corporation,

Defendant.

STATEMENT BY APPELLANT OF POINTS
ON WHICH IT INTENDS TO RELY

Comes now the Northwestern Mutual Fire Association, the above named Plaintiff and Appellant, and makes this statement of the points on which it intends to rely on the appeal herein:

1. The evidence as introduced in this case shows as a matter of law that the Defendant at all times knew that the Plaintiff had the catastrophe excess insurance which it had.

2. The evidence as introduced in this case shows as a matter of law that there was no risk (as such term is understood among insurance men in general) involved in the insurance of the Tacoma Narrows Bridge, at issue in this case, greater than fifty per cent of such insurance, and such fact was duly communicated to the Defendant.

3. The evidence as introduced in this case shows

as a matter of law that according to the universal custom and usage in the reinsurance business, excess catastrophe insurance such as it appears herein that the Plaintiff had, is never taken into account in computing the net retention of the reinsured.

4. Full premium for \$50,000.00 of reinsurance had been paid by Plaintiff to Defendant and, prior to judgment herein, no payment or tender of payment had been made by Defendant to Plaintiff on account of any reduction of such reinsurance.

5. Under the evidence in this case the trial court should have found for the Plaintiff and entered judgment in its favor as prayed in the amended complaint.

SHANK, BELT, RODE & COOK,
JO D. COOK,

Attorneys for Plaintiff and Ap-
pellant.

Copy received Oct. 12, 1943.

BOGLE, BOGLE & GATES.

[Endorsed]: Filed Oct. 18, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND APPLICATION RE-
GARDING ORIGINAL EXHIBITS

The parties hereto by their undersigned attorneys of record herein stipulate and request that this Court enter an order herein relieving the parties from printing or reproducing in the printed

record on appeal herein the following exhibits, the originals of which have been transmitted to this Court by order of the United States District Court herein, namely: Defendant's Exhibits A-14, A-15 and A-16; and the parties further stipulate and request that this Court in said order provide that said exhibits shall be considered by this Court in their original form, without reproduction, and as though set out in the printed record.

The reasons for not printing or reproducing said original exhibits are as follows:

Defendant's Exhibit A-14 is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period ending December 31, 1938, made by examiners from insurance departments of the States of Washington, North Carolina, Georgia and Oregon.

Defendant's Exhibit A-15 is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period ending December 31, 1939, made by the Department of Insurance of the State of Washington.

Defendant's Exhibit A-16 is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period

ending December 31, 1940, made by the Department of Insurance of the State of Washington.

On September 29, 1943, the District Court of the United States for the Western District of Washington, Northern Division, upon application of the Appellee, entered an order herein stating that the court was of the opinion that said original exhibits should be sent to the appellate court, in lieu of copies, and directing the Clerk of said District Court to transmit said exhibits in their original form to the United States Circuit Court of Appeals for the Ninth Circuit.

The Appellee's purpose in introducing said exhibits in evidence was a negative one, namely, to show that these exhibits did not contain certain information regarding reinsurance. In view of the lengthy nature of each of these exhibits, it is the judgment of the parties hereto, that it is both impractical and unnecessary to print or reproduce these exhibits, containing as they do a large amount of statistical information merely for the purpose of showing what they do not contain.

It is stipulated and agreed that the only reference to reinsurance in Defendant's Exhibit A-14 is the following:

“Reinsurance

The reinsurance department performs a very important function. The acceptance of large risks made it necessary for the Association to execute reinsurance treaties to protect it beyond its net carrying capacity. This additional carrying capacity is effected through contracts

with other mutual organizations in the United States and Canada covering the cessions of pro-rata quota share and excess coverage. The domestic facilities are supplemented by a contract with C. T. Bowring & Co., London, England, agents for underwriters at Lloyd's, London."

It is stipulated and agreed that the only reference to reinsurance in Defendant's Exhibit A-15 is the following:

"Reinsurance

The Association's reinsurance facilities appear to be adequate to meet all its requirements, having reinsurance treaties with a number of mutual organizations in the United States and Canada covering the cessions of pro rata, quota share and excess coverage. These reinsurance facilities are supplemented by a contract with C. T. Bowring and Company, London, England, agents for underwriters at Lloyd's, London."

It is stipulated and agreed that the only reference to reinsurance in Defendant's Exhibit A-16 is the following:

"Reinsurance

The Association's reinsurance facilities appear to be adequate to meet all its requirements, having reinsurance treaties with a number of mutual organizations in the United States and Canada covering the cessions of pro rata quota share and excess coverage. These reinsurance facilities are supplemented by a

contract with C. T. Bowring and Company,
London, England, agents for underwriters at
Lloyd's, London."

It is further stipulated and agreed that this
Stipulation and Application may be printed in the
printed record on appeal herein, in lieu of printing
said original exhibits.

Respectfully submitted.

BOGLE, BOGLE & GATES,
RAY DUMETT,

Attorneys for Appellee.
SHANK, BELT, RODE &
COOK,
JO D. COOK,

Attorneys for Appellant.

So Ordered:

FRANCIS A. GARRECHT,
United States Circuit Judge.

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT IN SUPPORT OF STIPULATION
AND APPLICATION REGARDING ORIG-
INAL EXHIBITS

United States of America,
State of Washington,
County of King—ss.

Ray Dumett, being first duly sworn, upon oath
deposes and says:

That he is one of the attorneys of record herein
for the above-named Appellee, Union Mutual Fire

Insurance Company, of Providence, Rhode Island, a corporation.

That affiant makes this affidavit in support of the within and foregoing Stipulation and Application Regarding Original Exhibits. That affiant has read said Stipulation and Application and all of the facts stated therein are true to affiant's knowledge.

That Defendant's Exhibit A-14 herein is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the original official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period ending December 31, 1938, made by examiners from the insurance departments of the States of Washington, North Carolina, Georgia and Oregon.

That Defendant's Exhibit A-15 herein is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the original official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period ending December 31, 1939, made by the Department of Insurance of the State of Washington.

That Defendant's Exhibit A-16 herein is a certified and authenticated copy, from the office of the Insurance Commissioner of the State of Washington, of the original official report of examination of plaintiff, Northwestern Mutual Fire Association, for the period ending December 31, 1940, made by the Department of Insurance of the State of Washington.

That each of said exhibits is a lengthy document

containing a large amount of statistical information.

That on September 29, 1943, the District Court of the United States for the Western District of Washington, Northern Division, upon application of the Appellee, entered an order stating that the court was of the opinion that said original exhibits should be sent to the appellate court, in lieu of copies, and directing the Clerk of said Court to transmit Defendant's Exhibits A-14, A-15 and A-16 in their original form to the United States Circuit Court of Appeals for the Ninth Circuit.

That the Appellee's purpose in introducing said exhibits in evidence was purely a negative one, namely, to rebut certain testimony previously introduced in the case by showing that these exhibits did not contain certain information regarding re-insurance. That in view of the lengthy nature of each of these exhibits, it is the judgment of the parties hereto that it is both impractical and unnecessary to print or reproduce these exhibits merely for the purpose of showing what they do not contain.

RAY DUMETT.

Subscribed and sworn to before me this 20th day of October, 1943.

[Seal] C. F. OSBORN,

Notary Public in and for the State of Washington,
residing at Seattle.

My commission expires July 22, 1946.

[Endorsed]: Filed Oct. 22, 1943. Paul P. O'Brien, Clerk.